MUNICIPAL BOARD DECISIONS

VOLUME EIGHT-A/1989

Nova Scotia

Municipal Board

90-05552/

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN: MICHAEL G. JOHNSON, C.A.

VICE-CHAIRMAN: LINDA D. GARBER, LL.B.

MEMBER: RICHARD L. WELDON

* * * *

DOREEN A. FRIIS – Clerk

CLYDE A. PAUL, LL.B. – Counsel

THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JANUARY 1, 1989 TO DECEMBER 31, 1989.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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NORTHWIND HOLDINGS LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - COMMERCIAL - BUSINESS OCCUPANCY - PERSON SIGNED LEASE BUT NOT OCCUPYING SPACE - ASSESSMENT ACT, S. 71.

N.H. Ltd. appealed from a decision of the Halifax City Regional Assessment Appeal Court reducing the 1987 assessment of a new 4 storey office building to $4,920,000. At the hearing the assessor set market value at $4,607,300. and N.H. Ltd. while disagreeing with methods used, accepted this figure as proper assessed value. Director of Assessment requested Board to adjust business occupancy assessment. Notices of hearing were given to all affected tenants.

HELD: Appeal allowed and market value reduced to $4,607,300. and business occupancy assessment adjusted. No costs.

A person who has signed a lease but not physically occupied the premises is not liable for business occupancy tax.were given to all affected tenants.

HELD: Appeal allowed and market value reduced to $4,607,300. and business occupancy assessment adjusted. No costs.

A person who has signed a lease but not physically occupied the premises is not liable for business occupancy tax.

NSMB-4-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S., 1967, Chapter 14, by **NORTHWIND HOLDINGS LIMITED** from a decision of the Nova Scotia Regional Assessment Appeal Court, Halifax City Assessment Region, dated March 11, 1988, which reduced the assessment of property located at 6155 North Street, Halifax, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: PETER J.E. McDONOUGH, Q.C., on behalf of the Appellant;

MARIAN TYSON, LL.B., on behalf of the Director of Assessment.

HEARING DATE: DECEMBER 9, 1988.

DECISION DATE: February 2, 1989.

DECISION **Appeal allowed.**

D E C I S I O N

The subject property is located at 6155 North Street in the City of Halifax. It consists of a four storey masonry office building with 11,750 sq. feet (base area). It is situated on a lot of land of 13,050 sq. feet and has the benefit of a parking and access agreement with an abutting site.

The property was originally assessed in 1987 for

$5,505,900.00. The Director subsequently reduced this by the application of Section 84 of the **Assessment Act** to $4,966,300.00. In its decision of March 11, 1988, the Regional Assessment Appeal Court, Halifax City, reduced this value to $4,920,000.00. In its Notice of Appeal received by the Board on April 5, 1988, the Appellant has sought a further reduction.

The Board has also been asked by the Director of Assessment to adjust, delete and add various business occupancy assessments directly related to the realty assessed value. This affects nineteen business occupancy assessments. As previously agreed by the Board the Notice of Hearing was sent to all tenants who were to be added to the business occupancy assessment roll or whose assessments would be increased if the Board changed the existing assessment. In addition, all tenants whose value changed were visited by the assessor responsible for the building assessment to give an explanation as to the proposed changes and the reasons therefor.

Mr. McDonough representing the appellant, also represented the largest tenant, the Family Practice Associates. No other tenants were present during the hearing.

The only witness before the Board was Donald B. Sutherland, an assessor for the Halifax City Assessment Region. Mr. Sutherland reviewed his report prepared for the hearing in which he valued the subject property (Exhibit N-1). He also reviewed the details shown on his summary sheet (Exhibits N-2 and N-3) which detailed the various business occupancy assessments

requested in relation to the recommended assessed value. He stated that in his opinion the market value for the subject property as of January 1, 1986, was $4,607,300.00.

Mr. McDonough stated that his client was not in agreement with the specifics of the calculation carried out by Mr. Sutherland but was in agreement with the final result. He offered no contradictory evidence.

The Board has reviewed the various sections of the **Assessment Act** relating to its powers. Section 101(2) gives the Board all the powers of the Regional Assessment Appeal Court. Section 89(1)(a) gives the Regional Assessment Appeal Court and thus the Board the power to "confirm, reduce or increase the valuation of the property that is the subject of the appeal and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed". Paragraphs (b) and (c) of the same Section give the power to add a name or to strike off a name.

Section 91(1)(a) gives the Court and thus the Board further powers whereby it may, of its own motion, "add to the roll any property that has been omitted therefrom...".

Section 92A(1) of the **Assessment Act** requires the Director to recompute business occupancy assessment if a Regional Assessment Appeal Court alters a property valuation. There is no such authority given the Director for Board decisions. Therefore, it is important for the Board to address business occupancy assessment in its decisions.

The Board was requested to determine the business occupancy assessments for the 1987 assessment year as follows:

Bus. Occ. Acct. no.	Account Name and previous Ass. No.	Previous Assessed Value	Recommended Value
001	Lawtons Drug Stores Ltd. AA#06037976 (Sec. 84 reduction)	$608,000.00 576,500.00	$576,900.00
002	Family Practice Associates AA#06037984	875,600.00	633,600.00
003	Lawtons Drug Stores Ltd. AA#06138578	391,000.00	Nil
004	Green, Haley & Pye AA#06138586	82,300.00	Jan.1/87 83,300.00 June 1/87,117,600.00
005	Landry Insurance Ltd. AA#06138594	55,100.00	Nil
006	Halifax Physiotherapy & Sports AA#06138608	92,200.00	93,200.00
007	Style Optical Ltd. AA#06138616	71,700.00	70,300.00
008	Dr. Maley AA#06138624	90,100.00	85,700.00
009	Meditch Services Ltd. AA#06138632	88,200.00	Nil
010	Dr. Baird (Dec. 3/87 - Gladstone Dental Group) AA#06138659	73,200.00	59,700.00
011	Stress Management Clinic Inc. AA#06138667	34,300.00	32,700.00
012	Dr. M. Reardon AA#06138675	59,000.00	54,800.00
013	Auto Drive A Way Ltd.		

	AA#06138683	6,200.00		12,600.00
014	Dr. S.F. Bedwell AA#06138691 (Reduced on Appeal)	46,200.00 (40,400.00)		42,100.00
015	Dr. E.L. Hansen AA#06216447	88,200.00		71,600.00
016	Mastercraft Group	Nil	April 1/87 June 1/87	65,600.00 64.000.00
017	Northwind Holdings for Public Works Canada	Nil		78,500.00
018	S.P. Dumaresq Architect Ltd.	Nil	May 1/87	187,000.00
019	Consolidated Restaurant Ltd.	Nil	April 1/87	50,000.00

Business occupancy account numbers 003, 005 and 009 show a reduction in their final assessed value to NIL. It was explained during the hearing that on closer examination the assessor was able to determine that, although they had in fact signed a lease, these three tenants did not physically occupy the space in question during 1987. It has been departmental policy not to assess business occupancy until a tenant physically occupies a space. In the absence of any argument to the contrary, the Board is prepared to accept this departmental policy as a fair application of Section 71 of the **Assessment Act**. This section says that business occupancy shall be assessed to "every person, occupying or using any commercial property".

The lease for business occupancy account number 017 is in the name of Public Works Canada for 1987. By virtue of Section 8(2) of the **Assessment Act**, this has been assessed to

Northwind Holdings Ltd. This Section states that if any property is leased to Her Majesty in right of Canada "the property shall be deemed to be in the occupation of the owner thereof and he shall be assessed thereon for business occupancy assessment and be liable to pay the tax levied thereon".

The Board notes that a number of these business occupancy accounts were subject to appeal at the Regional Assessment Appeal Court. Occupancy account number 001 was reduced by the Director under Section 84 of the **Assessment Act**. Account 002 was appealed but has not yet been heard. Account 006 was appealed and the appeal was adjourned pending resolution of this realty appeal. Appeals relating to account numbers 007 and 013 were dismissed and an appeal for account number 014 resulted in a reduction of the assessed amount.

With the possible exception of occupancy account numbers 002 and 006 the Board is satisfied that it has the power, jurisdiction and obligation to determine the business occupancy assessment in this case.

The Board is reluctant to exercise its power with respect to accounts 002 and 006 which have appeals properly before the Regional Assessment Appeal Court.

The value for business occupancy assessment before the Board is the result of a recalculation based only on the new value determined for the subject property. There may be other matters of concern to be raised by tenants who have appeals before the Court.

The Board is satisfied that this is not the case in this appeal. Family Practice Associates (002) was represented by counsel and agreed to the value recommended. Halifax Physiotherapy and Sports (006) received an explanation of the change from a direct discussion with the assessor and received the notice of hearing for this appeal. No one appeared at the hearing on their behalf.

For the purposes of this hearing and in the absence of any evidence to the contrary, the Board accepts the valuation as carried out by the assessor in his report. For the 1987 assessment year, the Board determines that the market value for assessment purposes for the subject property is $4,607,300.00.

The Board further determines that the business occupancy assessments for the 1987 assessment year be as recommended.

In light of the circumstances surrounding the issues involved in this case, the Board determines that no costs will be awarded.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of February, A.D., 1989.

MICHAEL G. JOHNSON, C.A.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

COLLINS v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - MARKET VALUE - RECENT SALE - RULES OF EVIDENCE - UNREPRESENTED PARTY.

This is an appeal from a decision of the Halifax City Regional Assessment Appeal Court confirming the 1987 and 1988 assessments on a 2 1/2 storey townhouse with a basement apartment in the amount of $264,000. The Appellant purchased the recently renovated 18th century home in March 1986 for $281,500.00, $10,000.00 of which was for a written warranty.

HELD: The appeal is dismissed and market value for assessment purposes is confirmed at $264,000. Costs awarded.

The best indicator of value is the recent sale of the subject property. A warranty is an integral part of land and buildings and thus part of assessable property. The fact that your neighbour is assessed too low is seldom a direct determinate in the valuation of your property for assessment purposes. The Board, while maintaining a balance between the parties, must make some attempt to ensure that the unrepresented party does not lose his case merely because he is not well versed in the procedure of adducing evidence.

NOTE: An Appeal to the Nova Scotia Supreme Court, Appeal Division was commenced but was subsequently withdrawn by the Appellant.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF :The Assessment Act, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF : An appeal by **EMILIA M.COLLINS and (Dr.) RICHARD COLLINS** , from a decision of the Regional Assessment Appeal Court , Halifax City Assessment Region , made on June , 1988 , respecting the residential property assessed to EMILIA M. COLLINS 5172 Bishop Street, Halifax, County of Halifax.

BEFORE : RICHARD L. WELDON , Member

COUNSEL : (Dr.) RICHARD COLLINS ,and EMILIA M. COLLINS representing themselves, Appellants
RANDALL R. DUPLAK, Q.C. representing the Director of Assessment, a Respondent ;

HEARING DATES: NOVEMBER 29,1988
DECEMBER 16, 1988

DECISION DATE: FEBRUARY 17, 1989

DECISION: APPEAL DISMISSED

DECISION

Under Section 16(1) of CHAPTER 9, S.N.S. 1981, THE **MUNICIPAL BOARD ACT**, the Chairman assigned Board member Richard L. Weldon to determine this appeal.

This is an appeal under the **ASSESSMENT ACT** , R.S.N.S. 1967, as amended.

The appeal concerns 5172 Bishop Street, Halifax, a residential property assessed to EMILIA M. COLLINS, one of the Appellants.

By some process not disclosed to the Board, this appeal concerns the assessment of the subject property for the assessment years 1987 and 1988.

The document purporting to be the Notice of Appeal (Exhibit C-1) is dated July 18, 1988, was received by the Board on July 20 , 1988 and says:

"(Dr. Richard Collins)
Dr. Emilia Collins

5170 Bishop Street
Halifax, Nova Scotia
B3J 1C9

July 18, 1988

Director of Assessment
(Municipal Unit)
Attention: Bob Warren BY RECEIPTED HAND DELIVERED
RE: Notice of Appeal from the decisions of the Regional Assessment Appeal Courts [sic].

Property: 5170/5172 Bishop Street, Halifax, N. S. B3J 1C9 Your Property Account No: 57-031257-000-000-000

Dear Mr. Director:
In accordance with the provisions of Section 100 of the Assessment Act, I [sic] have the honor of entering an Appeal from your [sic] decision dated June 22, [sic] 1988 concerning the assessment of the above referenced residential property which serves as our principal residence.

Our grounds for this appeal include, but are not limited to the following:

> There is an apparent error in law regarding your decision, inasmuch as there exist gross inconsistencies in the levels at which very comparable, and indeed adjacent, properties have been assessed. These properties, near the same intersection of Bishop Street and Hollis, all abut on the same parking lot.

Accordingly, I respectfully request a de novo inquiry into the matter, as set out in Section 101(1) of the **Assessment Act.**

Yours truly,
[signature]

(Dr.) Richard Collins
c.c.: Director of Assessment

(Municipal Unit)
Attention : Mr. Bob Warren

Municipal Clerk
(Attn. Mr. Ed Kerr)
City Hall

Nova Scotia Municipal Board
5th Floor
Bank of Commerce Building"

Richard Collins (called for this appeal "Dr. Collins" to distinguish him from his wife, Dr. Emilia Collins, the other Appellant) signed this letter. The only indication in the letter of his agency to sign on behalf of his wife is the inclusion of her name in the head of the letter. He testified that he was a co-owner of the subject property and was acting throughout as his wife's agent. She testified to the same thing.

The decision of the Regional Assessment Appeal Court (RAAC) was dated June , 1988 and was not mailed out until June 22, 1988. Dr. Collins filed his "Notice of Appeal" with the Board on July 20, 1988. The RAAC decision did not arrive at the Collins' before June 22,1988.

Acting on her behalf with her authority, Dr. Collins had no need to serve his "Notice of Appeal" on the assessed owner of the property, Emilia M. Collins, or on himself, perhaps one of the beneficial owners of the property.

On or before July 20, 1988, Dr. Collins served his "Notice of Appeal" on all other persons he must serve under Section 100(1) of the Assessment Act. The Director is the

only party who appeared against the appeal. Counsel for the Director consented to the Board's jurisdiction to hear the appeal. The Board found it had jurisdiction to hear the appeal on its merits.

The Board commenced hearing the appeal November 29, 1988. When it appeared that the Appellants needed time to subpoena certain witnesses, the Board adjourned that hearing to December 16, 1988.

The subject property consists of a multi-story town house containing a basement apartment (now vacant) with the upper stories serving as the Appellants' living quarters. Excerpts from Exhibit C-5, Appraisal Report pages 5-7 accurately describe the subject property thusly:

> "The subject property is rectangular in shape with a driveway leading to a parking area in the rear. The lot has frontage of 21 feet and a depth of 83 feet.
>
> ...
>
> The site has a two and one-half story dwelling plus finished basement apartment. The original house was extensively gutted, rebuilt and modernized during 1985. [p6]...
>
> The exterior of the building retains many of the 18th century lines. New wood siding, thermopane casement windows, new roof and a new one-storey section were all added in 1985.
>
> ...
>
> The dividing wall between each unit is constructed of antique brick. It is a double wall with an air space of several inches separating [p7] the two. This was originally designed to act as a sound barrier between the two units. During the 1985 refurbishing it was left exposed to give a distinctive touch of the past to the overall decor of the unit."

Dr. Collins testified himself, as, briefly, did the other Appellant. Mr. Duplak called the assessor, George Raymond

Graham. Dr. Collins then testified briefly in rebuttal. Dr. Collins and Mr. Duplak summed up their respective positions in argument.

According to Mr. Duplak, this appeal concerns the assessment of the subject property for the assessment years 1987 and 1988. Exhibit C-3, a copy of the decision of the RAAC, bears out his statement.

Again according to Mr. Duplak, these two assessments of the subject property had the following history:

1. The assessor, presumably for each year, set the assessed value at $270,000.00.
2. The Appellants appealed this assessment under Section 77(1) of the Assessment Act.
3. Under Section 84(3) of the Assessment Act, the Director altered that assessment to $264,000.00
4. This reduction did not satisfy the Appellants who appealed to the RAAC.(See Section 84 (5) of the Assessment Act.)
5. The decision of the RAAC dismissed the appeal thus leaving the properties assessed at $264,000.00
6. The Appellants were still not satisfied and appealed to the Board.
7. In preparation for this appeal, the Assessor prepared Exhibit C-5 in which he estimated the market value of the property at $266,700.00.

The Director did not appeal the decision of the RAAC.

On the first day of the hearing, Dr. Collins attempted to bring before the Board certain documents which Mr. Duplak resisted on the grounds that the documents were inadmissible. These documents were Exhibits:

1. C-11 which includes a report of Hometite Services respecting the subject property,
2. C-9 A Sears Estimate of gutter & eavestrough installation for 5170 Bishop Street, Halifax
3. C-10 a proposal to paint 5170 Bishop Street.

Mr Duplak's objections to the admission of these documents was that they might have been relevant, but that they were in the nature of expert reports. If the Appellants wished to use these reports in their appeal, Mr. Duplak argued they should produce the authors of the reports and, at least, make them available for cross-examination.

The Board set the proposed Exhibits aside and adjourned the hearing for the purpose, inter alia, of allowing the Appellants time to subpoena the authors of the reports. Dr. Collins chose not to subpoena the reports' authors. He said it was "too expensive."

The Board excludes all of Exhibit C-11. The first 7 pages of this exhibit are documents from one William Gimby of Hometite Services. The last page purports to be a painter's opinion also concerning the subject property. The Board excludes these documents as inadmissible experts' reports whose authors should have been made available before the

Board at least for the purposes of cross-examination. The authors were available and the Appellants chose not to call them.

Exhibit C-9, a Sears estimate for eavestrough was admitted by the Board since it passed an opinion on the cost of replacing existing gutter and eavestrough but passed no opinion of the need of such replacement. Exhibit C-9 was the type of document that ordinary householders would, from time to time, order. The Board admitted this document as being relevant to the appeal and since it was the type of document often used by householders in the ordinary course of business as such householders.

Exhibit C-10 was a proposal for painting 5170 Bishop Street directed to Dr. Collins. The Board admitted this document for much the same reasons as it admitted Exhibit C-9.

While dealing with the Board's findings on the admissibility of some of the Appellants' evidence, it may be convenient to deal here with the Board's opinions on the admissibility of some portions of the Director's evidence.

There is a view that boards, in general, have broader scope as to admissibility of evidence than do courts: some argue that fact is part of the **raison d'etre** for the existence of boards in the same legal system with courts. (This distinction is somewhat muddied by Section 1 (b) of

the Nova Scotia Evidence Act R.S.N.S., 1967, Chapter 94 which says:

"In this Act..."court' includes any person having by law or consent of parties authority to receive evidence;").

Conceding the generality to be true, a Board may put some limits on the type of evidence it will admit.

Often a Board will admit evidence that it knows might not meet the stricter reqirements a court might impose on such evidence. When admitting such evidence, it can do so feeling that it will shorten the proceedings by admitting the evidence while knowing that the questionable evidence will have small probative effect. The Board could treat such evidence as admissible, but of little weight.

Mr. Duplak called and qualified Mr. Graham as an expert assessor qualified to give opinion evidence on real estate valuation for assessment purposes in Halifax. Mr. Graham prepared his reasoned report, Exhibit C-5. Through this same witness Mr.Duplak tried to adduce Exhibit C-21, an 1986 appraisal of the subject property from Fram-Malay. He also tendered Exhibit C-20, a letter to the assessor dated November 24, 1988 from the original contractor Greystone/Molloy (who reconstructed the subject property and sold it to the Appellants). This letter stated that the subject property had $10,000.00 worth of show home fittings that the other comparable buildings in the row of housing did not have.

The authors of both these reports were available and could have been called by the Director.

Mr. Duplak argued that both these documents were the type of documents that an assessor would use in arriving at a value for a property and that they were therefore admissible. He said they were the type of documents that any expert witness would use in preparing his report and were admissible on that account as well.

Dr. Collins made no strong objections to the admissibility of these documents although he did voice a general objection that the Board appeared to allow the Director to adduce evidence of the same kind that the Board had prevented him from adducing.

When a person appears before the Board, unrepresented by counsel, oppposing a governmental body represented by counsel and demonstrates to the Board a lack of expertise in the finer points of procedure and the admission of evidence, the Board, while maintaining a balance between the parties, must make some attempt to ensure that the unrepresented party does not lose his case merely because he is not well versed in the procedure of adducing evidence.

In this hearing the Board had strong misgivings concerning the admissibilty of both Exhibits C-20 and C-21.

Mr. Graham strongly relied on Exhibit C-20 as being support for his position that the subject property was a superior property to comparable properties contained in the

same row of housing to the extent of $10,000.00, the amount estimated in Exhibit C-20.

Dr. Collins vigorously cross-examined Mr. Graham as to the specific extra finishings and additional improvements listed in Exhibit C-20 and the portion of the sum "in excess of $10,000.00" to be attributed to each item listed.

Mr. Graham, as an assessor, has a great deal of experience when costing a property under the cost of development approach. In assessing in a city as old as Halifax, Mr. Graham learned skills of valuing old buildings by looking into specific construction details of buildings constructed during the various eras of written Nova Scotian history. He has cost manuals broken down into materials, adjusted for time. He should be able, with careful observation of the construction of a property, and with his skill and facilities, cost any building's "extra finishings and additional improvements." His answers to the cross-examination showed that Mr. Graham had not carefully observed the subject property for "extra finishings" and had made no attempt whatsoever to individually cost the items listed by Brian Molloy of Greystone. He uncritically used the Brian Molloy estimate without any testing with his assessor skills and facilities of the accuracy of the estimate. He felt the Board should also unquestionably accept on faith the accuracy of the report.

Mr. Duplak proved that the construction of the subject property was the subject of litigation between the Appellants v. Brian Molloy and Greystone Construction Limited in the Small Claims Court in June, 1988. The decision of the Small Claims Court was appealed by stated case to the County Court by the Collins.

The application to state, apparently made on July 18,1988, (Exhibit C-19 as tendered by Mr. Duplak), does not disclose how or whether the County Court disposed of the appeal.

All parties at the Board hearing treated the County Court appeal as having been dismissed in the summer of 1988. For the purposes of this hearing, the Board will also.

The Board assumes this somewhat extensive litigation might have strained any relationship between the Appellants and Brian Molloy and company. This strained relationship would likely have affected Mr. Molloy's answers when he replied to Mr. Graham's request for information made while preparing for the scheduled November Board hearing.

In the circumstances outlined above, should the Director have wished to bring in the Molloy report, it is the Board's opinion the Director should have produced for qualificaton and cross-examination the author of the report. Molloy's report was uncritically accepted by Mr. Graham. The Board is not prepared to accept the report so uncritically.

Perhaps the Board should have excluded the Molloy report on the grounds stated by Mr. Duplak elsewhere in this hearing . His statement may be paraphrased thus:"To make an expert's report admissible, the author of an expert's report should, at least, be made available before the Board for cross-examination by the other parties."

The Molloy report was on an important material point raised by the assessor tending to support his ranking of his comparables and to discount the Appellants' theory that the two most nearly comparable houses in his row were essentially equal. The Molloy report was also used by the assessor to justify increasing his written estimate of value of the subject property by $10,000.00. The Board holds the opinion that the best practice in such circumstances would be for the proponent of the expert's report to produce both the report and the author for cross-examination by the other side.

If the assessor had made a real effort within his expertise to test the accuracy of the statements in the Molloy report, the Board, because of its acceptance of the assessor as an expert, might have been more inclined to admit the report. An expert can sometimes take the report of another expert and so analyze it that the first expert is able to vouch for the accuracy of the second report. Had the report been scrutinized sufficently by the assessor, he might have been reasonably able to vouch for its accuracy.

Mr. Graham accepted the report on blind faith. He did not use his expert skills to even sample audit the report for accuracy. Mr. Graham was aware of the hostility that the dispute between the Appellants and the Molloy forces must have engendered yet he was prepared to accept the Molloy report at its face value.

Mr. Graham stated that he accepted the Molloy report since he did not receive sufficent co-operation from the Appellants in obtaining the information necessary to prepare the assessment of the subject property. Having heard the totality of the evidence and observed the demeanour and conduct of the parties at the hearing, the Board accepts that probably Mr. Graham did not receive from the Appellants the co-operation that he was accustomed to receive in assessment matters.

Had he not received, in the assessment stage, the co-operation from the Appellants they are required by law to provide, (see the **Assessment Act** Sections 16, 17,& 18, inter alia) then he could have invoked Section 20 or, perhaps, Section 108 of that statute to enforce the Appellants' compliance with the disclosure reqirements necessary to found an accurate assessment of their property. There is no indication that Mr. Graham used anything other than persuasion to enforce the Appellants' compliance with their duties to disclose information to him at the assessment stage.

Perhaps a judicious subponae service on the Appellants at the RAAC stage of the proceedings would have given Mr. Graham any facts from the Appellants to which he might have been entitled. There is no indication that such tactics were used.

Had Mr. Graham wished, subponae could have been served on the Appellants to produce any missing information at the Board hearing. Again, there was no application to the Board to enforce any subpoena against either of the Appellants.

With these, and perhaps other, legal resources open to the Director (and his assessor) to obtain what information they were entitled to, the Board is not going to admit an otherwise questionable estimate merely to make up a lack of co-operation in the assessment process by the Appellants, as perceived by the assessor. If the Appellants were legally unco-operative with Mr. Graham, he had ample power, opportunity and time to apply for and receive the Appellants' enforced co-operation.

(Under new Board rules, in force January 1, 1989, the Director will have additional remedies with which he may obtain for a Board hearing information he believes is being unfairly witheld by an opposing party.)

On the other hand, the Board has allowed the text of Exhibit C-20 to be discussed on the record before the Board. Dr. Collins has cross-examined Mr. Graham on the document and has made statements contradicting the report. Dr Collins

has made statements avoiding the report. Dr. Collins said that cost of the items listed in the report were mostly all folded into the original purchase price of the subject property.

Perhaps the Board, by its conduct of the hearing, admitted Exhibit C-20 almost by default. If Exhibit C-20 is properly before the Board (which the Board doubts for the reasons set out), then the Board can give it little weight when opposed to the evidence of Dr. Collins. If the Molloy report were being applied in any Cost-of-Development approach to valuation the Board would surely exclude the report. The Board will not exclude the reports since the Board accepts Dr. Collins evidence that essentially all of the "extra finishings and additional improvements" were loaded into the original purchase price of the subject property (at whatever amount). It will not accept the report's statement that the value of in "excess of $10,000.00 " as being proven as a fact. Too many question marks hang over this estimate to commend the Board's total acceptance of the facts alleged in the report.

Exhibit C-21, an appraiser's report provided to Molloy on January 28,1986, is specifically on time with the assessment date and comes from, apparently, a real estate appraiser , one Brian G. Varner of Fram, Lay, Malay & Associates. If the Board were to accept the values for the subject property set

out in Exhibit C-21 that would effectively dispose of this appeal in favour of the Director.

This Fram report duplicates the function of the assessor in that it purports to set a market value of the subject property. It might be an useful tool to an assessor to have to check against his own assessment value of the property. It does not, in the view of the Board, qualify for admission under the general umbrella of the Assessor's expertise as forming part of the facts on which he based his assessment. The Board knows that this report superseded a previous value estimate for the same property and the same customer. It knows that the appraisal was prepared for a customer who used this type of appraisal as part of its sales pitch. The Board knows that all properties in the row were not sold as of the date of this appraisal.

In view of the high probative value of the Fram report (if admitted), in view of the different motives for which such a report can be and was used, in view of the total effective duplication of the assessors valuation of the subject property (rather than a contribution of some of the fact leading up to his valuation opinion), the Board will not allow the report in without first having the author of the report prove his expertise, if any, and be available for cross-examination by the Appellants.

If the Director wishes to tender in evidence another expert's written opinion to bolster the opinion of his

assessor, the Board suggests he call that expert, qualify him if he can, and make him available to be cross-examined by other parties. Since the Director chose not to do this, and since the text of this report is so germane to the meat of this dispute, the Board, for these reasons, believes that Exhibit C-21, although relevant, is not admissible.

Mr. Duplak tendered Exhibit C-19 which is an Application to State a Case from the Order of Clyde A. Paul, Small Claims Court adjudicator dated at Halifax June 24, 1988. Mr. Duplak stated that this Order of the Small Claims Court dealt with the same issues of fact (hidden defects, faulty construction and the like) that the Appellants were trying to prove in this appeal in order to lower the value of the building on the subject property for assessment purposes. (As previously noted the present Appellants lost both the Small Claims Court decision and the subsequent appeal to the County Court.)

Mr. Duplak first seemed to argue that these findings of fact bound the Board and thus the Appellants' allegations of defects were wrong as having already been disposed of between the parties by a court having jurisdiction to dispose of the matter. As an alternative argument, Mr. Duplak stated that the Board could and should take into consideration, in weighing the evidence of Dr. Collins on the defects, the findings of fact which were apparently made

It also provides for an Ajudicator, a Clerk of the Court, and regulations and an appeal to a County Court Judge on a stated case as a **persona designata**:

> "6 (1) Each sitting of the court shall be presided over by an adjudicator.
>
> 8 (1) The Attorney General may appoint or designate persons in the public service of the Province to be clerks of the court upon such terms and conditions as the Attorney General determines.
>
> (2) A person appointed or designated pursuant to subsection (1) shall perform the duties and functions of a clerk of the court in accordance with this Act and the regulations.
>
> (3) Every clerk of the county court shall be a clerk of the Small Claims Court.
>
> 21 (1) (b)...issue a certified copy to the claimant...
>
> (4) It is the duty of the clerk of the court to
>
> ...
>
> (d) attend on such matters as the Attorney General may direct.
>
> 31 (1) An order made by the court under this Act may be made an order of the county court and thereupon ...
>
> (2) To make the order of the court an order of the county court the adjudicator shall endorse a copy of the order certified by him to be a true copy as follows:
>
> Make the within an order of the county court.
> Dated this ..... day of....., 19.....
>
> .....
> Adjudicator of the Small Claims Court
> of Nova Scotia
>
> 32 (1) A party...may appeal from an order...of the adjudicator...by applying to state a case to be transmitted to the county court...
>
> (2) The order or decision of the county court is final and not subject to appeal.
>
> 33 (1) The governor in Council may make regulations
>
> (a) governing the practice and procedure relating to claims and appeals under this act;
>
> (i) generally with respect to any matter that under this Act may be regulated;

(j) respecting such matters and things as are necessary for or incidental to the carrying out of the provisions of this Act in accordance with the purpose of this Act."

The regulations under the **Small Claims Court Act** do not determine anyone to have the duty to certify Small Claims Court documents for production as evidence elsewhere.

If Secton 19 of the Nova Scotia **Evidence Act** applies in this matter (as it could possibly be construed-"any province of Canada") there is no certification of the documents tendered. Thus the documents tendered are not admissible before the Board under the criteria set out in Section 19.

Section 18 of the Nova Scotia **Evidence Act** most likely is the governing section of the Act concerning the documents tendered by Mr. Duplak. The documents are clearly not originals. Therefore they must be copies. They purport to be documents from file 1984 CH 62805 which purports to be a file "IN THE COUNTY COURT OF HALIFAX DISTRICT NUMBER ONE". Ignoring the inaccurate title, these documents appear to be the type of documents which would be on file at a county court on an application to state a case on appeal from the Small Claims Court. There is no seal of the County Court on any of these documents or any certification of the copies by the Clerk of the County Court who would be the proper officer. The documents are not admissible by reason of Section 18 (1) of the Nova Scotia **Evidence Act**.

Schedule "B", the last two pages of Exhibit C-19, appear over the signature of "Clyde A. Paul, Ajudicator," but there is no certification under the seal of or certification by the proper officer under his hand. There is no certification whatsoever of any of these documents.

The Small Claims Court is a statutory court of recent origin. Among its officials are ajudicators, clerks of court and administrators. A quick perusal of the legislation and the regulations supported thereby shows there is no specific powers given to any of these officials to certify copies of documents in Small Claims Court files so as to make them admissible elsewhere. The legislation does not seem to provide any seal for the Small Claims Court. Schedule "B" of Exhibit C-19 is probably a copy of a document filed in a county court in any event. If it is a document filed in a Small Claims Court, then it does not meet the criteria of Section 18 (2) of the Nova Scotia Evidence Act which would assure Schedule B's admissibility before this Board.

Page 2 of Exhibit C-19 purports to be an order disposing of Claim No: 15085 "IN THE SMALL CLAIMS COURT OF NOVA SCOTIA, COUNTY OF HALIFAX". Again this is signed by an obvious photostat signature of "Clyde A. Paul " Adjudicator. It is not certified as required by Section 18 (2) of the Nova Scotia Evidence Act. A certificate in statutory form making the order an order of the county court has been dated

but not completed. Section 18 (2) of the Nova Scotia Evidence Act does not make this order admissible in this hearing.

The Nova Scotia Evidence Act, in the view of the Board, does not make Exhibit C-19 admissible before the Board. Proper compliance with the Evidence Act requirements could likely have made Exhibit C-19 admissible at least as documents filed in the County Court.

Is it admissible otherwise?

Mr. Duplak had Dr. Collins identify the photostat signatures of himself and his wife on the first page of Exhibit C-19 "APPLICATION TO STATE CASE". He had Dr. Collins verify that there was a small claims court suit as set out and that there was a stated case on appeal to the County Court which was dismissed.

The Board, having regard for these facts and believing that as a tribunal it may admit relevant credible evidence that is not in dispute (but might not be admitted in a court), admits these docments contained in Exhibit C-19 as being accurate copies of some of the litigation in the Small Claims Court and/or County Court between the Appellants and the Molloy forces. In admitting such evidence, the Board has satisfied itself that the evidence would be useful to the final determination of the appeal and is likely true and not really capable of rational dispute by the parties, at least

as to its content. For these reasons, contained in this paragraph only, the Board allows in Exhibit C-19.

Having admitted Exhibit C-19, the Board finds it convenient to decide here what to do with it.

The Board is satisfied that on the purchase of the subject poperty, the Appellants obtained from the builder a written warranty which dealt with the building on the subject property and its condition. No text of this warranty has been put before the Board.

The Board is satisfied that the Appellants instituted an action in the Small Claims Court against the builder based, at least in part, on defects or other breaches of the warranty. The Board is satisfied that the Appellants lost their action in the Small Claims Court and in their subsequent stated case on appeal to the County Court, all before the inception of this appeal to the Board.

Mr. Duplak's comments on the alternative views the Board should take of Exhibit C-19 are set out previously in this decision.

Dr. Collins made the counter argument that the decision of the Small Claims Court was wrong, the County Court on appeal was wrong, and that if any further appeal were possible he would appeal and would (the Board assumes it is his belief) win when another appeal court correctly applied the right law to the right facts.

Mention was also made that the Small Claims Court Order in its text made two types of findings. Either of which, if correct, would resolve the dispute in favour of the Molloy defendants. If the deficency reasons in the decision were correct and were the determinant in the case, the Small Claims Court order might be construed, by some, to have some relevance to the present appeal. If the time reasons in the Small Claims Court order were the determinant, then the Small Claims Court order would not be relevant to this appeal at all since the expiry of the warranty begs the question of any defects in the building which defects may be in issue in this appeal.

There is no mention of why the County Court upheld the decision of the Small Claims Court.

The Municipal Board Act, section 33 (1) says:

> In determining any question of fact, the Board shall not be bound by the finding or judgment of a court in a proceeding involving the determination of such fact, but such finding or judgment shall in any proceedings before the Board be prima facie evidence only.

The Board cannot, in its interpretation (most favourable to the Director) of the Small Claims Court decision, be sure, to a balance of probabilities, that the defects dealt with in the Small Claims Court decision were the same defects that Dr. Collins was claiming should give him relief in this appeal. Even if they were, the Board accepts Dr. Collins' evidence, backed up by photographs (Exhibit C-12),

that his hollow common brick wall contained cracks which admitted fumes into the living space in his premises when certain heating units were utilized. The Director called no evidence bearing on this point except the findings contained in the order of the Small Claims Court. On this point the Board accepts the sworn evidence before it of Dr. Collins.

Dr. Collins chose not to detail, with admissible evidence, how or whether these defects in the wall could be corrected and what the cost of such correction would be.

As stated before, the unseen decision of the County Court (as well as the order of the Small Claims Court) could have rested on the pillar of time. The County Court could have made a finding that the time for enforcing that the written warranty had expired. Such finding would, in no way, contradict that portion of Dr. Collins' evidence on the building defects in the brick common wall.

If there is an issue of fact of some importance that has been dealt with in another court prior to the Board hearing, the Board feels the better practice demands that at least some evidence be called which would lead the Board to decide that the factual issues in both hearings were identical. Such a finding would allow a more convincing argument that the prior findings of fact ought to be applied in the subsequent Board hearing.

The above seems to dispose of all the major evidentary questions raised in the hearing.

Mr Duplak's strongest point for the Director shows that the Collins closed the sale of the subject property very shortly after the date set by the Director to determine the assessment (January 1, 1986) namely March 5, 1986. The evidence is clear that this closing was preceeded by an agreement of sale containing the requirement for a written warranty on the condition of the building (see Exhibit C-19). (At neither the Small Claims Court [according to Exhibit C-19] hearing nor at our hearing did Dr. Collins disclose the text of the agreement of sale, or its date.) The sale closed for a negotiated price of $281,500.00.

The gross amount of this purchase price is not in dispute between the parties. For assessment valuation purposes, Mr. Graham deducted 1% a month for a time adjustment of -2% or minus $5630.00 leaving an adjusted market value on January 1, 1986 of $275,870.00. The Board feels this is a proper time adjustment which, if it is in error, errs in favour of the Appellants.

If this were all the evidence before the Board (and ignoring the total interaction between the parties active in this appeal), the Board would have been tempted to accept this figure as the determining value which the Board would use when it applied the factor of the general level of

assessment to arrive at the value of the subject property for assessment purposes.

Dr. Collins argued that he paid more than market for the subject property because he was living, confined, in a hotel for some time with a wife and child. He could not find an alternative property which he wished to buy suitable for his purposes. He said he had seen the property once and had turned it down and then had to come back to it to find a place suitable.

Dr. Collins said that he paid $10,000.00 extra to obtain the written warranty of the building. In order for this fact to aid the Appellants, the Board must assume Dr. Collins thought the assessed value of the building should have been reduced to take the cost of the warranty out of the cost of the property, especially when he tried to enforce the warranty and failed. The Board doesn't see that the written warranty was an extra purchase and should be separated from the building and land (as one might separate the cost of appliances that had been included in a purchase price) cost when setting the market value for assessment purposes.The Board sees the warranty as an integral part of the lands and buildings and thus part of the assessable property.

Dr. Collins' evidence clearly shows that the written warranty dealt with the construction quality of the building and was an integral part of the agreement of sale for that

land and building. He wouldn't have purchased the land and building without the written warranty.

When he tried to enforce the warranty, he failed. For the reasons stated previously in this decision, Dr. Collins' failure to enforce the warranty did not mean it was not worth the $10,000.00 (approximately) he said it cost him. It might have had worth to Dr. Collins within the time of its existence, or there might have been no actionable breach of the warranty. Neither of these findings indicate that the warranty never had value. The Board finds no grounds to reduce the purchase price of the subject property by the cost of the warranty, whatever it might have been.

There is undisputed evidence before the Board that the calculated general level of assessment for residential properties in Halifax applicable to January 1, 1986 was 96.3%. If one applies this factor to the time adjusted price of the subject property of $275,870.00 one arrives at a market value of the subject property $265,662.81 rounded to $265,700.00. The Board, in the absence of other evidence (and again ignoring the total interaction between the parties active in this appeal), would have had little difficulty in finding that this is the market value for assessment purposes of the subject property.

This amount differs from the figure ($266,700.00) estimated by Mr. Graham by only $1,000.00. In this case, the Board accepts the premise that the best indicator of

value is the recent sale of the property itself. In doing so it uses the other comparable's sales figures as support only. It does not accept, as necessary in this case, the weighting of the sales comparables carried out by the assessor by which he arrived at his recommended value of $266,700.00.

Dr. Collins tried hard to have the Board accept his sale as not an arm's length transaction because he made it under duress of the circumstances of his then condition. The Board is satisfied that his purchase was made at arms length, with solicitors advice, by a person who had economic options. Dr. Collins felt he could make a $280,000 purchase in 1986. In the view of the Board, that economic ability allowed him to be a purchaser in other areas of Metro had he found other houses as satifactory to his purposes.

Dr. Collins severely criticised the comparables used by the Director. If comparables are necessary in this appeal it is clear that the two internal units are quite similar both in style and content to be useful in helping to set a correct estimate of the value of the subject property.

Dr. Collins has objected to the far end unit as not being a suitable comparable since it was designed inside as mostly commercial and has a much higher value because of its use. It also has a larger usable back yard because its back yard is not subject to the same vehicular rights-of-way that run over the back yards of the other three units. The

external appearance of the other end unit is much the same as the subject property. The Board sees nothing wrong with using this unit, as well, as a comparable in attempting to set a valuation of the subject property for assessment purposes. The Board concedes that its commercial use would raise its value disproportionally and make it less closely akin to the subject property in value.

Dr. Collins would have the Board use the old single family restored properties across the court yard from the subject properties as the proper comparables. Not, one suspects, for their sale values which exceed $300,000.00 apiece. He wanted the Board to use these examples of the proper spread to put between market value and assessment value . These houses qualify by proximity to be comparables. In other respects, on the evidence, they are not as suitable comparables as the comparables selected by the assessor in the same row of housing. The old single family units were restorations not renovations. They are made of stone. They are single family, not row housing.

The assessor agreed the examples used by Dr. Collins as his comparables were grossly underassessed in relation to their sale values as determined by the market. This discrepency does not materially affect the outcome of this appeal.

The proper test of market value against assessment value is the statisitcal test given when one applies the general

level of assessment against the market value. This was done above.

Dr. Collins has shown some nearby houses where their assessment values are immensely lower than their market values. It is to be hoped that these discrepancies, if timely, would have been factored into the calculation that led to the determination of the applicable general level of assessment.

In any event, the fact that your neighbour is assessed too low is seldom a direct determinate in the valuation of your property for assessment purposes. The **Assessment Act** contemplates that one might approach this obvious inequity by bringing the low assessment to the attention of the assessor. If that fails, Section 77(2) of the **Assessment Act** allows any ratepayer to appeal upward the assessment of any other assessed owner in the municipality. Dr. Collins has not followed this procedure but he could have.

A possible error in one assessment does not justify an equivalent error in another.

Dr. Collins has been critical of the adjustments made by Mr. Graham when dealing with his comparables to the subject property. Given the result of this appeal arrived at by the Board, it will not deal with those objections in detail.

Dr. Collins called no suitable evidence to quantify the cost of repairing the problems of smoke intrusion he complained of. He was given ample opportunity to do so and

adequate instructions on how to do so. From this the Board may conclude with equal likelihood of being correct, either there was no evidence to call or the evidence to be called would show the defect could be cured with little cost. There may be other much less probable explanations, but the Board is entitled to infer that one of the two first explantions is probably correct and does so. That being the case the Board is unable to reduce Dr. Collins' assessment for the smoke intrusion defect in his building.

Once on the stand, Mr. Graham tried to increase the assessed value of the subject property by $10,000 which would have made his estimate of the subject property at $276,700.00. This change was brought to the Board by the Director without an appeal initiated by the Director and over the Director's reduction made originally in his statutory review of the the aseesssment. The evidence concerning this increase has been dealt with earlier in this decision. The Board sees no merit in the increase and does not allow it.

Mr. Graham was correct when he said "The best indicator of value is a recent sale on the subject property itself."

Mr. Graham was correct in not using the Income Approach to Value in this case.

Mr. Graham did not err when he used the Cost of Development approach as an additional check on the estimate of value he arrived at by using the Market Data Approach to

value. He was also correct in selecting the Market Data Approach to Valuation of the subject property for assessment purposes.

The Board finds that the value of the most recent sale of the subject property is the best indicator of its value for assessment purposes. This concept is dealt with in Cummings V. Director of Assessment(1986) 5-A M.B.R. 27 @ p50:

> "There would be no problem with assessments if each property to be assessed were sold in a freely negotiated market sale of each property on the date prescribed by the Director of Assessment in accordance with his usual practice. Assessment would follow the market and assessment would be uniform wihin the municipality."

The Board would ordinarily have set this value at $265,700.00 (This value applies both for the assessment year 1987 and 1988 since no one has made any meaningful distinction between the two values in evidence which would allow the Board to distinguish between the two years.) for the reasons stated above.

The Board has, however, looked at the attempt of the Director to adjust the assessment upwards without instigating an appeal on his own. The Director had downgraded the original assessment, according to Mr. Duplak, under Section 84(3) of the Assessment Act to $264,000.00. The RAAC agreed with that valuation made by the Director in the course of his statutory duties. He now seeks to increase

that amount. In such circumstances, a court might apply estoppel to prevent this action of the Director.

The issue of the Director's informal appeal has not recently been argued before the Board in any meaningful way. In this appeal the Appellants did not have the preparation necessary to argue this point. Sections 89 and 91 of the **Assessment** Act allow the RAAC to increase the valuation of any property. Whether these powers, imported to the Board, require the Board to exercise these powers in circumstances as described in this appeal does not have to be decided by the Board in this appeal in order to arrive at the valuation of the subject property for assessment purposes.

The difference between that decision of the Director (upheld by the RAAC) and that which the Board believes the evidence could lead it to decide is only $1,700.00 or an increase of approximately .6%. The Board believes that to estimate a value of real property to that small margin of difference (or error) is a virtual impossibility. The Board is unable to say to a balance of probabilities that its valuation is superior to that arrived at by the Director in the course of his Section 84 duties (as upheld by the RAAC). In view of this small difference and the circumstances noted in this and the preceeding paragraph, the Board finds the assessed value of the subject property for assessment purposes for the assessment years 1987 and 1988 to be $264,000.00.

The Assessor had very close to the Cummings ideal here. A test of his values by the comparables showed no wild discrepancies. A test by the Cost of Development Approach again seemed to come close and so confirmed the assessed value arrived at.

Both parties asked for costs. Mr Duplak asked for $50.00 costs in any event because Dr. Collins asked for and received an adjournment to call other witnesses and then chose not to do so. Mr. Duplak wishes $50.00 costs of the day. The Board feels he is entitled to this amount as reasonable in these circumstances.

The Appellants failed in their main appeal. On reading the decision of the RAAC, they seemed to fail for the same reasons in that Court as they did at their de novo appeal therefrom before the Board. In such a circumstance the Board would be inclined to award party and party costs against the Appellants in favour of the Director on the County Court scale existing prior to December 31,1988.

In this case however, the Director, without filing an apppeal, sought an award higher than that he had adjusted for in his review of the assessment and higher than that ordered by the RAAC. This late application to increase the assessment by , in this case, some $10,000.00 can in some circumstances smack of an attempt by the Director to intimidate the taxpayer initiating his appeal.

In any event, the Director's effort to add extra assessment without filing an appeal failed.

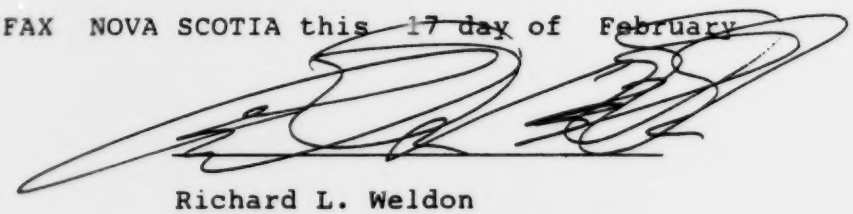
In respect to the main portion of the appeal the Board will allow no costs to either party. The Appellants will owe the Director $50.00 costs of the day thrown away for the unecessary adjournment.

In summary, the Board determines the subject property has a market value for assessment purposes as follows:

1. For the assessment year 1987 $264,000.00
2. For the assessment year 1988 $264,000.00
3. The Respondent Director shall have his net costs as against the named Appellants in the lump sum of $50.00.

An order will issue accordingly.

DATED AT HALIFAX NOVA SCOTIA this 17 day of February 1989.



Richard L. Weldon

Member

JONES v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - EXEMPTIONS FOR SENIOR CITIZENS - IN-LAW SUITE.

F.I.J. appealed from a decision of the Cape Breton Regional Assessment Appeal Court reducing the 1988 assessment of a 2-bedroom bungalow plus in-law suite in basement to $56,700.00. At the hearing the assessor set the assessment at $61,500.00 based on the direct sales approach using 3-bedroom homes as the comparables.

HELD: Appeal dismissed. Assessment confirmed at $56,700.00.

There is some increase in market value to be attributed to the existence of a third bedroom in a single family home. An in-law suite located in the basement of a home would be of interest only to certain special purchasers and would certainly not add to the market value of a house in equal value to a 3rd bedroom located on the main living area. A decline in market value of property in a community after the date set by the Director for assessment purposes cannot be taken into account.

At present, each municipal unit has the power to grant taxation relief to senior citizens. There is no Province-wide scheme for the granting of property taxation relief. The Board has no legislative authority on which to grant assessment reduction or exemption for senior citizens.

NSMB-12-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S., 1967, c. 14, by **FLORA I. JONES** from a decision of the Nova Scotia Regional Assessment Appeal Court, Cape Breton Region, dated October 7, 1988, which reduced the assessment of property located at 49 MacAulay Avenue, Glace Bay, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: FLORA I. JONES on her own behalf;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: JANUARY 26, 1989.

DECISION DATE: FEBRUARY 22, 1989.

DECISION: Appeal Dismissed.

D E C I S I O N

The subject property is located at 49 MacAulay Avenue, Glace Bay, Nova Scotia. It consists of a detached one-storey residence containing 1150 square feet with two bedrooms. In addition, it has a finished in-law suite covering approximately 23% of the basement area. MacAulay Avenue is a quiet street with a fairly even mixture of bungalows and multi-storey dwellings.

The property was originally assessed in 1988 for

$58,400.00. In its decision of October 7, 1988, (received by Mrs. Jones on October 20, 1988) the Regional Assessment Appeal Court, Cape Breton Region, reduced this value to $56,700.00. In a Notice of Appeal received by the Board on November 18, 1988, the Appellant has sought a further reduction.

In the Notice of Appeal Mrs. Jones stated that at the Regional Assessment Appeal Court hearing she was told that she would be allowed a reduction of 5% on the assessed value of $58,400.00. Upon receipt of the decision from the Regional Assessment Appeal the new assessment was $56,700.00 which was not a 5% reduction. Evidence presented during the course of this hearing showed that certain costs relating to the in-law suite in the basement had not been included in the original assessment. This amount was added by the Regional Assessment Appeal Court to the original assessed value prior to the calculation of the 5% reduction. No reason was given for this reduction. In order for the arithmetic to work in this situation, the costs related to the in-law-suite must have been in the vicinity of $1,300.00. Mrs. Jones indicated that she had been told that the amount was $1,856.00.

Mrs. Jones read her prepared presentation to the Board. In this presentation, she made an impassioned plea for the relief of taxation of senior citizens. The Board feels that her closing paragraph is worth repeating here:

> "For senior citizens, alternative accomodations to living in our own homes, like nursing homes and senior citizen accomodation complexes are a financial drain on the economy. It would be in the interest of the

> taxpayer of the Province of Nova Scotia, if every senior citizen, living in their own home, without the need for nursing care or the like, would receive an assessment-free benefit. However, this is not the case, and until it is, I feel those senior citizens like myself, who lead a productive lifestyle of volunteer work with those less fortunate than myself should not be unduly forced to reconsider home ownership. But, allowed to live the independent, productive lives they were intended to."

As much as the Board may sympathize with Mrs. Jones' sentiments, it is unable to grant her the assessment relief she seeks. There are no provisions under current legislation in the Province of Nova Scotia to grant relief to senior citizens for exemption from assessments. At present, each municipal unit in Nova Scotia has the power to grant taxation relief to senior citizens on their properties. There is no Province-wide scheme for the granting of property taxation relief. It is up to each municipality to determine how they should treat the senior citizens within their boundaries. At present the Board has no legislative authority on which to grant assessment reduction or exemption for senior citizens.

In her presentation to the Board, Mrs. Jones reviewed the circumstances surrounding the purchase of her two-bedroom house, reviewed other properties in her neighbourhood including new construction in the area, reviewed the circumstances around her Regional Assessment Appeal Court appeal and provided pictures of her neighbourhood.

Mrs. Jones referred to the parking lot and the noise and confusion caused by the four-unit apartment building directly

behind her house. The Board notes that this apartment building was present when Mrs. Jones purchased her property in December, 1986, for $63,000.00.

Mrs. Jones also included pictures of two two-unit apartment buildings next door to her property. The Board notes that these two buildings were constructed during 1988 and after the time frame on which the 1988 assessment is to be based.

The only witness for the Director, was Mr. Edward MacInnes, who is a senior assessor for the Cape Breton Assessment Region. Mr. MacInnes was accepted by the Board as an expert witness qualified to give opinion evidence in assessment matters for the Cape Breton Assessment Region.

Mr. MacInnes reviewed in some detail his report (Exhibit J-3) in which he calculated the value for assessment purposes of the subject property by the cost approach and by the direct sales comparison approach. He arrived at a value of $72,700.00 by using the cost approach and $61,500.00 by the direct sales comparison approach. Both amounts are after applying a general level of assessment rate of 1.02. In his final statement of opinion Mr. MacInnes has adopted the direct sales comparison approach value of $61,500.00 as the most appropriate in the circumstances.

The Board agrees with the decision of the assessor that the direct sales comparison approach is usually the most appropriate method of valuing residential property provided that sufficient sales of a comparable nature can be found. The Board

also agrees that it is the most appropriate method for this case.

The Board is concerned at the $72,700.00 value arrived at by the use of the cost approach. If the Board is correct in its understanding of the assessment process in Nova Scotia, this figure appears to be somewhat high in comparison to the original assessment of the subject property in the amount of $58,400.00.

It is the Board's understanding that a card is maintained in each Regional Assessment Office for every residential property in the Province of Nova Scotia. This card contains all the information necessary for an assessor to calculate a value for a property by using the cost method. Every three years this card is reviewed by an assessor and updated for changes in economic conditions and physical changes to the property. A new assessment is then prepared.

In this particular case, the difference between the assessment calculation based on the information on the card of $58,400.00 and the valuation of $72,700.00 prepared by the same cost method for this appeal appears to be excessive-approximately 25% increase. One would sincerely hope that this difference in assessment levels is not being experienced for the whole of the Town of Glace Bay, for the Cape Breton Assessment Region or the whole of the Province of Nova Scotia.

Having accepted the direct sales comparison approach for valuation, the Board reviewed the details of the comparable properties in some detail. The Board has noted that all four comparisons are three-bedroom homes. The subject property is a

two-bedroom home. In her presentation to the Board, Mrs. Jones quoted a comment concerning the real estate market which stated:

> "Two bedroom homes are the least popular and hardest to sell homes in the market today."

While this comment was not otherwise substantiated by Mrs. Jones, the Board tends to believe that it has some credibility.

In his analysis and adjustment charts of the sales comparisons the assessor made no mention of the bedroom differences nor was any adjustment made to sale prices. One might assume that the in-law suite in the basement of Mrs. Jones' residence might be considered to be a third bedroom. The Board believes that an in-law suite of this sort located in the basement of a house would be of interest only to certain special purchasers and would certainly not add to the market value of a house in equal value to a third bedroom located on the main living area.

The comparison chart prepared by the assessor contains a section which compares the finished basement area of the four comparable homes with the subject property. The Board assumes that the existence of the in-law suite was accounted for in this area. The Board also notes that the assessor chose to make no cash adjustments for the differences in finished basement areas of the five properties.

It is apparent to the Board that the assessor assumed the four properties to be comparable to the subject property

based on the equality of the square footage of the living area and not on the number of bedrooms contained therein.

As already stated above, the Board is of the opinion that there is some increase in market value to be attributed to the existence of a third bedroom in a single family residence. There was no evidence presented during the hearing to assist the Board in arriving at a value to place on this difference. The Regional Assessment Appeal Court had set the property value at $56,700.00. The Board is prepared to accept an adjustment for the third bedroom in the net amount of $4,800.00 to arrive at this same amount.

In doing so the Board still has some difficulty in accepting this adjusted figure of $56,700.00 in light of the fact that Mrs. Jones paid $63,000.00 (including drapes and appliances) for the property in December, 1986, in an arms-length transaction. Even allowing a significant amount (the assessor suggested flea-market prices were adequate) for drapes and appliances the adjustment would not be sufficient to bring the value down to that extent. Nonetheless, the Board cannot escape the fact that the adjusted sales values of the four properties selected by the assessor as appropriate showed values lower for three bedroom homes than that paid by Mrs. Jones, for a two-bedroom home.

Mrs. Jones complained about the amount of traffic and late night noise caused by the four-unit apartment building located directly behind her house. It is obvious to the Board

that this in excess of the amounts that she had expected to experience when she purchased the house.

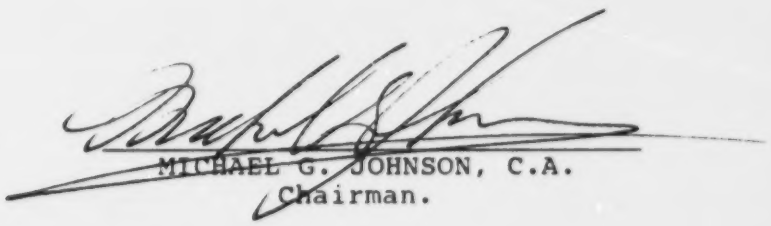
In light of all the foregoing the Board is of the opinion that the market value for assessment purposes for the subject property located at 49 MacAulay Avenue for the 1988 assessment year is $56,700.00.

As this is the amount determined by the Regional Assessment Appeal Court, the appeal is hereby dismissed.

No costs will be awarded in this case.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of February, A.D., 1989.



MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

DIRECTOR OF ASSESSMENT v. WOODS ET AL (PIER 21)

ASSESSMENT - COMMERCIAL VS. RESIDENTIAL - BUSINESS OCCUPANCY-BOARD JURISDICTION TO EXEMPT CULTURAL ORGANIZATIONS - ASSESSMENT ACT S. 1(naa), 3(1), 25b, 89(1)(C).

This is an appeal by the Director from a decision of the Halifax City Regional Assessment Appeal Court which held that space leased from a government agency by artists was residential and not commercial. The leased premises were in Pier 21 an office and warehouse complex on the waterfront. The appeal related to 7 artists and one architect (S) and covered the years 1986, 1987 and 1988. With the exception of S, all Respondents were members of the Waterfront Art Association and used their rented space to pursue their art. S used his space first as an office and then for storage.

HELD: Appeal allowed. Property classified as commercial and Respondents subject to business occupancy. No costs.

Property is commercial unless it is resource or residential. Clearly not resource. Space was rented for purposes of developing art forms which are not conducive to the home environment by professional artists who deduct rental expense from income when received. Premises are not used or intended to be used for residential purposes. Board has jurisdiction to deal with exemptions from business occupancy. The Waterfront Artists Association might qualify for an exemption but individual artists occupied space for pursuit of his/her art and not for Association. S's use of space commercial, not for residential purposes.

NSMB-11-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, Chapter 14 by the **DIRECTOR OF ASSESSMENT** from a decision of the Nova Scotia Regional Assessment Appeal Court, Halifax Assessment Region, dated September 21, 1988, in which classification of property owned by **PORTS CANADA** in the City of Halifax and occupied by **WILLIAM C. WOODS, SCOTT SMITH, MARILYN KELLOUGH, VERLE HARROP, LESLIE ARMSTRONG, BARBARA LOUNDER, RICHARD ROBERTSON** and **MARILYN MCAVOY** was changed from Commercial to Residential.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

COUNSEL: RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment;

MICHAEL T. PUGSLEY, LL.B., on behalf of the Respondents.

HEARING DATES: January 30th and 31st, 1989.

DECISION DATE: May 19, 1989.

DECISION: **Appeal allowed.**

D E C I S I O N

This is an appeal by the Director of Assessment under the **Assessment Act**, R.S.N.S. 1967, Chapter 14. The appeal relates to the classification of certain rental property as either commercial or residential.

The subject properties are located at what is known as

Pier 21 on the waterfront of Halifax Harbour. The properties are situated in office and warehouse space located in two areas of the Pier 21 ocean terminal known as the Immigration Annex and the Central Office Bay. The Respondents all occupied space which was leased from the Halifax Port Corporation, a Federal Crown Corporation.

With the exception of Scott Smith, all the Respondents are visual artists who each used the rented space in carrying out functions in respect to their various art forms. Mr. Smith, in the years in question, used his space solely for storage.

The assessor originally classified the rental space occupied by the Respondents as Commercial property, assessed for both realty and business occupancy. A decision of the Regional Assessment Appeal Court, Halifax Assessment Region, dated September 21, 1988, changed the classification for the rental space from Commercial to Residential. This decision had the effect of striking the Respondents names from the business occupancy rolls.

The Director in a Notice of Appeal received by the Board on October 6, 1988, appealed this decision to the Board.

This appeal is concerned with property classification, realty assessment and business occupancy assessment for the taxation years 1986, 1987 and 1988. Each of the Respondents received both realty and business occupancy assessments in respect of the subject space for one or more of the three years in question.

In April, 1986, an association known as the Waterfront Art Association was incorporated under the **Societies Act of Nova Scotia**. The objects of the Society, as stated in its memorandum of association are:

> "a) To establish strong stable lines of communication between artists and the public through public access to the artists' working environments.
>
> b) To field inquiries from organizations or individuals concerning visual arts.
>
> To establish a pool of visual artists from which speakers may be selected to discuss visual art questions with various civic groups;
>
> c) To acquire by way of grant, gift, purchase, bequest, device or otherwise, real or personal property and to use and apply such property to the realization of the objects of the Society;
>
> d) To buy, own, hold, lease, mortgage, sell and convey such real and personal property as may be necessary or desirable in the carrying out of the objects of the Society."

With the exception of Scott Smith all of the Respondents are members of this association.

The City of Halifax and Ports Canada were named as Respondents in the Notice of Appeal. Both parties indicated to the Board that they would not participate in the proceedings.

Mr. Duplak, for the Director of Assessment, called one witness, Mr. Donald P. Sutherland, an assessor for the Halifax City Assessment Region.

In addition to the eight tenants who are respondents in this Appeal, Mr. Pugsley called three other witnesses, each of whom are artists or persons related to the art community.

Mr. Sutherland was qualified as an expert witness to

give opinion evidence on assessment matters for the City of Halifax. He reviewed his report (Exhibit D-1) in some detail. The Report outlined various sections of the **Assessment Act** and various definitions which, in his opinion, related to the proper assessment classification of the subject properties. He concluded his report with the opinion that the appropriate classification for the subject properties would be commercial.

The report also contained a number of schedules and diagrams. One contained information showing the assessment records for the various leased properties. Another showed a lease analysis which contained information showing the date of commencement of each lease and when and if it had been terminated.

Much of the testimony of the seven Respondent artists was similar in nature. They all felt themselves to be professional artists whose primary purpose was the development of their art and not necessarily to make a profit. Each strove to develop their particular art form and to increase the public and peer recognition of their artistic efforts. Most worked in an art form which, at best, would have been very difficult to carry out within the confines of a normal residence. Many had received Canada Council Grants for the development of their art. All had had showings of their art in parallel, university or other types of galleries. All believed that their art was done to promote the artist and the art form being presented as well as to raise artistic consciousness of the public. Each reviewed

and explained a number of slides which depicted the various art forms and how each are prepared and displayed. Each indicated that they were unable to make a living from their art.

Mr. J. Christopher Woods is an instructor at the Nova Scotia College of Art and Design and for the School of Architecture, Technical University of Nova Scotia. Since 1970 he has had an extensive list of group and solo exhibitions both in Canada and in other parts of the world. He has received a number of awards in this time period including two Canada Council Grants and three short term grants. He also has a number of principal collections located in museums, art galleries or universities in Canada and Great Britain. He stated that, in relation to his duties as an instructor for the Nova Scotia College of Art and Design it is necessary for him to continue doing his art work on a regular basis. This is part of his continued qualification as a teacher of art.

Marilyn McAvoy is a graduate of the Nova Scotia College of Art and Design in 1985 with a Bachelor of Fine Art. She is at present an instructor in continuing education for the College. She has had a number of art-related work experiences and has had a number of exhibitions displayed in various art galleries and universities.

Barbara Lounder obtained a Master of Fine Arts from the Nova Scotia College of Art and Design in 1984. She has received a variety of grants since 1981. She has had a variety of teaching experiences since 1982 and is presently an instructor at

the Nova Scotia College of Art and Design. She has had extensive group and single exhibitions throughout Canada. She has done a number of presentations and workshops throughout Canada as well and has a number of publications to her credit.

Verle M. Harrop obtained a BSc. in occupational therapy from the University of Toronto in 1975. Since 1977 she has been involved in teaching with the Department of Culture, Recreation and Fitness for the Province of Nova Scotia and the Nova Scotia College of Art and Design. She has had a variety of selected exhibitions, commissions, collections and representations since 1982 mainly in Nova Scotia. She has also exhibited her work in other parts of Canada and the United States. She has also published a number of articles on art.

Marilyn Kellough obtained a Bachelor of Fine Arts Degree from the Nova Scotia College of Art and Design in 1983. She is currently a self-employed artist and has a part time job as a bartender. She has had a number of exhibitions at various locations in the Halifax area. In 1983 she received a direct grant from the Nova Scotia College of Art and Design and a private bursary. In 1987 she received an exhibition assistance grant from the Department of Culture, Recreation and Fitness.

Leslie Armstrong obtained a Bachelor of Fine Arts Degree from the Nova Scotia College of Art and Design in 1975 and a M.A. in Art Education, Philadelphia College of Art in 1985. She currently teaches part time at the Nova Scotia College of Art and Design. She has participated in exhibitions in Canada and

the United States and has done some commissioning work in the City of Halifax. She is a fibre (textile) artist. She composes her art works on a loom which is 12 feet high and weighs approximately 1100 pounds.

Richard S. Robertson defined his work as installation work in sculptural design which is prepared for one purpose and one place and then usually demolished. To supplement his art work he is a house painter. He has had a number of exhibitions mainly in the Maritime area and has received a project cost grant from Canada Council.

Scott Smith is the only respondent who is not a visual artist. He originally leased the space to use in his architectural practice which he did until January 5, 1987. He subsequently used the space for storage of a variety of items. A picture provided, (Exhibit D-8), shows a conglomeration of desks, chairs, boxes, containers and numerous other miscellaneous items located in this space. He informed Ports Canada (Exhibit D-9) on December 10, 1986, of his intended change in use. He stated that all the items located in the space were his own personal property and included the residual property from his business.

There were three other witnesses who testified on behalf of the Respondents.

Jeney Kelly is the curator of the Dalhousie Art Gallery for the last 9 1/2 years. She is a member of the Visual Arts Advisory Committee of the Canada Council. She spent some time

in familiarizing the Board with the Canada Council grant system and how it works including many of the factors considered by the Committee in determining the grants. Under questioning from the Board Ms. Kelly gave a five-part definition of a professional artist:

1. A degree in Fine Arts;
2. A teacher of Fine Arts;
3. Recognition by peers;
4. An exhibition history;
5. Spending a large portion of life dedicated to some particular art form.

The definition does not necessarily include making a living from art. She stated that she was familiar with at least three quarters of the artists present and considered them all to be professionals.

Mindy B. Miller is a Masters' student at the Nova Scotia College of Art and Design. She was formerly a member of the Waterfront Art Association and she had sublet space in the subject property at Pier 21 from one of the Respondents. She suggested that her art was not geared toward the market place but towards her peers. She reviewed four of her slides representing her work.

Kim Truchan has a Bachelor of Fine Arts and works at the Saint Mary's Art Gallery. She is Secretary of the Waterfront Art Association and has shared work space at Pier 21 with Chris Woods since 1986. She discussed her definition of

what an artist would be and reviewed four slides depicting her work.

Mr. Pugsley had presented the Board with a list of documents of the Respondents (Exhibit D-2) which had ten tabs of information included within it. Mr. Duplak objected to the inclusion of the information under tab-2 which contained statements of the respondent artists in addition to six others who were not parties to the appeal and were not called to testify. (Two subsequently did testify.)

He objected to the inclusion of a submission under tab-3 and a paper under tab-5 on the grounds that they are hearsay.

Tabs-6, 7, 8, 9 and 10 contained information concerning the Waterfront Art Association. Mr. Duplak objected to the acceptance of this evidence based on its relevancy. The Waterfront Art Association was not a party to the appeal nor was it a tenant of any of the subject property.

Tab-1 contained the curriculum vitae of the various artists and tab-4 contained a letter from the Waterfront Art Association to the Regional Assessment Appeal Court appealing the business tax and applying for a reduction of commercial property tax on behalf of the various artists.

Although the Board has made minimal use of the information contained in the information objected to by Mr. Duplak, the Board accepts the Exhibit in total as evidence properly before the Board.

In its decision, Collins v. Director of Assessment

NSMB-10-88-A (Application for Leave to Appeal outstanding) (unreported) at page 8, the Board stated that:

> "Often a Board will admit evidence that it knows might not meet the strict requirements the Court might impose on such evidence. When admitting such evidence it can do so feeling that it will shorten the proceedings by admitting the evidence while knowing that the questionable evidence will have small probative effect. This Board could treat such evidence as admissible but of little weight".

The Board feels that the evidence in Exhibit D-1, particularly as it relates to the information provided by the Waterfront Art Association, is of some small assistance to the Board in increasing its general understanding of the artists' concept of their situation as it relates to their properties located in Pier 21.

At the completion of the formal evidence and argument the Board reserved its decision. The Board viewed the properties at Pier 21 and a number of the leased spaces.

There are a number of issues which must be determined as a result of this appeal.

The first issue relates to a concern about the interpretation of Section 3(1)(a) of the **Assessment Act**: should this section be restricted to liability for business occupancy assessment and not be applicable to real property assessment?

The second and main issue before the Board is the appropriate classification of the subject properties, either as commercial or as residential as provided by Section 25 of the **Assessment Act**. If it is determined that the properties should

be classified as commercial then they are subject to business occupancy tax.

The third issue is whether or not the Board has the power to grant an exemption from business occupancy assessment.

If the Board has the power to grant an exemption, the Board must determine whether the Respondents qualify for such exemption.

During the hearing the Board raised a concern about the interpretation of Section 3(1)(a) of the **Assessment Act** which states as follows:

> "3(1) The following property is exempt from taxation under this Act:
>
> a) all property vested in Her Majesty or vested in any person for Imperial, Dominion or Provincial purposes, and either unoccupied or occupied by some person in an official capacity: if any such property is occupied by any person otherwise than in an official capacity, the occupant shall be assessed and rated in respect thereof, but the property itself shall not be liable." (underlining added).

The Director has calculated realty assessments on each of the subject properties for the years under appeal because the space was leased from the Crown and each has been occupied by a "person otherwise than in an official capacity".

The underlined portion of this section is currently interpreted by the Department and others to mean that the occupant is liable for an amount of tax equal to the tax on the real property assessment for that portion of the property which is occupied. The Board questioned whether the Section should be restricted to liability for business occupancy assessment.

The Board has done a historical review of the legislation and determined that similar wording existed in the **Assessment Act** prior to the introduction of business occupancy assessment.

The Board is satisfied that the Section does make a non-official occupier of Crown property liable for the tax on the real property assessment for that portion of the property which is occupied.

The issue of whether or not property vested in a Crown Corporation satisfies Section 3(1)(a) of the **Assessment Act** was not raised by the parties. For purposes of this appeal, the Board is assuming that Section 3(1)(a) does apply.

In addition there may be a Section 15 **Charter of Rights** argument available to the Respondents. The parties did not raise it before the Board and no evidence was adduced on this issue. The Board cannot deal with it.

Section 25(1) of the **Assessment Act** provides that "all assessments shall be designated as being residential property, commercial property or resource property, or partly one and partly another".

A review of certain definitions included in Section 1 of the **Assessment Act** and relating to section 25 is necessary in determining the classification of the subject properties.

> "1(ca) "commercial property" means all property or part thereof except residential property and resource property, and includes the forest property owned by a person who owns fifty thousand acres or more of forest property in the Province;

(naa) "residential property" means property or part thereof used or intended to be used for residential purposes, but does not include the portion of a hotel or motel used for the purpose of lodging for the public;

(nb) "resource property" means:

(i) farm property;

(ii) forest property owned by a person who owns less than fifty thousand acres of forest property in the Province;

(iii) land of a municipal water utility, excluding any building or structure thereon;

(iv) community fishermen's service buildings, occupied and used by boat owners who are licensed commercial fishermen, and the land used in connection therewith;..."

The definition of "commercial property" includes all assessable property except those which are specifically excluded. The only excluded properties are "residential property" and "resource property" as defined.

It is obvious that the subject properties are not resource properties as defined and the Board will not consider that aspect further.

The definition of "residential property" is not so easily determined. This issue centers around the phrase "to be used for residential purposes".

Each of the artists testified that they considered themselves to be professional artists. They pursued this vocation for the sake of their art, for the recognition of their peers and for the education of the public. Monetary success was not a prime goal in its own right. The evidence did show that

any income received as a result of their art work or from Canada Council Grants was taxable and that expenses related thereto were deductible for income tax purposes.

It is illustrative to review the evidence relating to Mr. J. Christopher Woods when examining this issue.

Mr. Woods is an instructor at the Nova Scotia College of Art and Design. He is required to have a studio in which to continue his art work both for instructional purposes and professional development purposes. From time to time he has applied for a Canada Council Grant to assist the growth of his art. To obtain these grants he must have showings. This is not unlike many of his peers in other forms of academia who must also have their works published on a continuing basis in order for their professional careers to advance. Unfortunately for Mr. Woods, the Nova Scotia College of Art and Design does not provide the space for him to carry out his art. Unlike most of his colleagues in other universities, Mr. Woods cannot develop his art within the confines of his house or office.

The other artists who testified fit the profile of Mr. Woods to one degree or another. The artists who hold non art related jobs said that they would be more than pleased to forego those jobs should their art form produce sufficient income to enable them to do so.

The subject properties were rented for the purposes of developing the various art forms of the Respondent artists. The various art forms are not conducive for development in the home

environment. Each of the artists considers himself or herself to be a professional and not a hobbyist. For Income Tax purposes, income or grants that are received are taxable and expenses related thereto are deductible.

In view of these facts, the Board does not accept that the subject properties are "used or intended to be used for residential purposes".

The circumstances relating to Scott Smith are somewhat different. He is not an artist. He leased his space originally for use in an architectural practice. The space was subsequently converted to a storage space for personal articles including residual property from his business.

It was argued that if the same articles had been stored in his personal residence the assessor would have considered the residence still to be residential property and assessed as such. As the nature of the storage space has not changed in either location the use of the rental property should not be assessed as commercial.

As previously discussed, in order for the property not to be classified as commercial it must meet the exemption provisions of the definition. This property is certainly not resource property nor in the Board's opinion can the property be considered to be "used or intended to be used for residential purposes".

It is the Board's opinion that, unfortunately, the subject properties do not meet the exemptions included in the

definition of "commercial property". Therefore they must be classified as "commercial".

Commercial property is subject to business occupancy assessment by virtue of Section 7(1) of the **Assessment Act.**

This Section states:

> "In addition to any assessment of property under this Act every person occupying any commercial property...shall be assessed for a sum to be called "business occupancy assessment"."

The business occupancy assessment for the subject properties is equal to fifty percent of the assessed value of the subject properties as required by Section 7(2)(c) of the **Assessment Act.**

The Respondents argue that they should be exempt from business occupancy assessment by virtue of Section 25(B) of the **Assessment Act.**

The Director of Assessment takes the position that the Board has no jurisdiction to consider the issue of exemptions. There are a number of decisions dealing with this issue, some of which are in conflict. In Berzins v. Director of Assessment (1987), 6-A, M.B.D., the Board reviewed the various cases but declined to decide the issue.

Before examining the various decisions, it is necessary to review certain sections of the **Assessment Act.**

The Board's powers on an assessment appeal are similar to those of the Regional Assessment Appeal Court. These powers are generally set out in Sections 89(1) of the **Assessment Act** and include "(c) strike off the roll the name of any person

wrongfully entered thereon".

Section 108 of the Act provides for an application to the County Court or Supreme Court for

> "the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongfully classified".

Section 23 of the Act sets out what is to be set down on the assessment roll, including each piece of property, the name of the owner and the amount of any exemption.

Section 7 deals with business occupancy assessment. It is assessed to the occupant. The resultant tax does not constitute a lien upon the real property.

While it is not specified in Section 23, the name of the person liable for business occupancy assessment is set out on the assessment roll.

Sections 34 and 35 of the Act provide that assessable property which is partially or wholly exempt is to be assessed and entered on the assessment roll and the amount of the exemption specified.

Section 25B provides for an exemption from business occupancy for certain persons. There is nothing in this section which indicates whether or not the name of the occupier is to remain on the roll if the occupier is exempt from business occupancy assessment.

Section 32 of the **Municipal Board Act**, S.N.S. 1981, c. 9, deals with the jurisdiction of the Board and states as

follows:

> "(1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board as to all matters within its jurisdiction under this Act has authority to hear and determine all questions of law or of fact."

The following decisions deal with the jurisdiction of the Regional Assessment Appeal Court and/or the Board with respect to exemptions.

The Nova Scotia Supreme Court, Appeal Division in Edgehill School v. Town of Windsor et al (1979), 32 N.S.R. (2d.), 263, ruled that the Regional Assessment Appeal Court did not have jurisdiction to deal with exemptions. The Court stated at page 268:

> "A challenge of exemption is clearly not a matter of a person having been wrongfully omitted from the roll or of property being wrongfully "classified", which relates to the classifications referred to in the Act, e.g., residential, farm, timber property, etc."

The issue before the Court was an exemption from real property tax. The question of exemption from business occupancy assessment was not before the Court.

In Halifax Civic Workers et al v. Director of Assessment, (1982) 54 N.S.R. (2d.), 390, Mr. Justice Nathanson of the Nova Scotia Supreme Court was asked to grant an exemption from business occupancy assessment to the Applicants. His Lordship determined that the real issue was that they had been wrongfully placed upon the roll and therefore he had no

jurisdiction under Section 108. Nathanson, J. went on to state that "the proper course is to file an appeal under s. 77" (at page 393).

The Appeal Court's decision in Edgehill was not cited by Nathanson, J. The two cases can be distinguished. Edgehill deals with an exemption from real property assessment and Civic Workers deals with an exemption from business occupancy assessment.

The Board followed Mr. Justice Nathanson's decision in Re Halifax Civic Workers Union (1983), 1 M.B.D. 319 and Lebanese Association v. Director of Assessment (1984), 3-A M.B.D. 19, and assumed jurisdiction to consider exemptions from business occupancy tax pursuant to Section 25A(1) of the Act.

In Lunenburg v. Bridgewater P.S.C. (1983), 59 N.S.R. (2d.) 23, the Nova Scotia Supreme Court, Appeal Division, ruled that the application for an exemption "in the circumstances of this case, raises a question of statutory interpretation" because it involved the wording of an additional statute. The Court concluded as follows at page 28:

> "It seems to me that a claim for exemption from liability of taxation put forward by reason of an Act of the Legislature under s. 3(aa) goes beyond the matters referred to in s. 77(1)."

The Court did not refer to any previous decisions on this issue. The case dealt with an exemption for real property assessment under a specific statute and not a claim for exemption from business occupancy assessment.

Hallett, J. of the Nova Scotia Surpeme Court, Trial Division, followed the Lunenburg v. Bridgewater P.S.C. decision in P.S.C. v. Halifax because the issue before him was "one of statutory interpretation". He went on to state at page 79 as follows:

> "From a practical point of view, if the other route was followed and the property continued to be found assessable, it would eventually end up in the court one way or another so the issue might just as well be decided now by this Court."

Again the case dealt with real property assessment and not business occupancy assessment.

The two lines of cases can be distinguished on the basis that those cases in which the Court took jurisdiction under Section 108 deal with real property assessment and those cases in which the Board had jurisdiction deal with exemptions from business occupancy assessment.

In the case of business occupancy assessment, it is the occupant who is liable and not the property. The appeal is to strike off the roll the name of the person. With respect to real property assessment, the Act specifies that the real property is to remain on the roll even though it is exempt.

The Board, therefore, concludes that it does have jurisdiction to consider the question of exemption from business occupancy assessment under Section 25B of the **Assessment Act**.

Section 25B provides as follows:

> "(1) Persons occupying property for the purpose of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or

sporting organization or institution shall not be assessed for a business occupancy assessment".

The Respondents argue that they belong to the Waterfront Artists Association and that it is a non-profit organization whose primary function is to foster the awareness of art in the public.

The Association was incorporated on April 14, 1986. A copy of the Memorandum of Association and the By-laws were placed in evidence. A list of the activities of the Association in 1986 and 1988 was also introduced.

The Board has reviewed the exhibits and is satisfied that the Waterfront Artists Association is a non-profit organization whose purpose is both educational and cultural and as such might qualify for an exemption under Section 25B on any space leased for the administration of the activities of the association.

Were the premises at Pier 21 occupied by the artists for the purposes of the Association? All the leases with the Halifax Port Corporation are in the names of the individual artists. Each artist is pursuing his or her own artistic endeavours. In addition the artists have on occasion allowed their space to be utilized by the Association. This has been for tours and public exhibitions.

There is no evidence before the Board that the Association has occupied any specific premises. The Board was not advised of a phone number or an address for the Association.

There are 1988 Minutes of the Association which indicate that meetings were held.

The Board is not satisfied that the various artists occupied their premises for the purposes of the Association. While one of their purposes may have been for the education of the public, the Board finds that the primary purpose of each artist's occupation of the premises was for the pursuit of his or her artistic endeavours. The Board does not exempt the artists premises from business occupancy assessment.

The Board wishes to state that it is not unsympathetic to the concerns raised by the artists during the course of this appeal. However sympathetic the Board may feel, it only has the mandate to apply existing assessment legislation. It cannot exceed its legislative mandate.

In summary, the Board determines that:

a) the realty assessment was properly assessed under Section 3(1)(a);

b) the subject properties are classified as commercial and thus subject to business occupancy assessment as provided by Section 7(1);

c) the Board has the jurisdiction to consider the question of exemptions from business occupancy assessments under Section 25(b);

d) the Respondents are not exempt from business occupancy assessment.

The Board therefore allows the appeal and confirms the

assessment values as detailed in Schedule "A" of the Assessor's Report (Exhibit D-1) for both the realty tax assessment and the business occupancy assessment.

The realty assessments and thus the property value, were not questioned by any of the parties in this appeal. These values are confirmed by the Board only for the purposes of calculating the business occupancy assessment. The Board has no knowledge of the methods used to calculate the property value and therefore makes no comment thereon.

Schedule "A", "Assessment Record for artists and Mr. Smith", of the Assessor's Report has been attached to and forms part of this decision.

Neither party addressed the question of costs relating to the hearing of this appeal. Under the circumstances, the Board determines that no costs will be awarded in this appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of May, A.D., 1989.

MICHAEL G. JOHNSON
Chairman.

LINDA D. GARBER
Vice-Chairman

RICHARD L. WELDON
Member
NOVA SCOTIA MUNICIPAL BOARD.

WOODLAWN SHOPPING CENTRE LTD. ET AL v. DIRECTOR OF ASSESSMENT

ASSESSMENT - JURISDICTION - NOTICE OF ASSESSMENT - CAN BOARD HEAR AN APPEAL RELATING TO THE JURISDICTION OF THE REGIONAL ASSESSMENT APPEAL COURT - DE NOVO - ASSESSMENT ACT, ss 98(1), 99, 100(1), 101, 108(1).

The Appellants were late in filing their Notice of Appeal and the Regional Assessment Appeal Court refused to grant a hearing. The Appellants appealed to the Board. The Board held a preliminary hearing on the issue of jurisdiction.

HELD: The appeal is dismissed without costs.

Any application to the Regional Assessment Appeal Court under Section 98(1) and any decision or determination of that Court is a jurisdictional matter and as such is not subject to review by the Board. Even if it were appealed, the Board does not have sufficient powers upon which to dispose of the matter.

The Board is to inquire into a matter **de novo** and this contemplates that the merits of the case have previously been heard in another forum.

Note: Leave to appeal to Nova Scotia Supreme Court Appeal Division granted.

NSMB-3-89-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, c. 14, by **WOODLAWN SHOPPING CENTRE LIMITED** and **CLIFTON MANAGEMENT CORPORATION** from a decision of the Nova Scotia Regional Assessment Appeal Court, City of Dartmouth Assessment Region, made April 18, 1989, which decision denied the request for an extension of time to file an appeal with respect to assessments on various properties owned by the Appellants.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: JOHN S. MacFARLANE, Q.C., for the Appellants;

RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

PRELIMINARY HEARING DATE: September 6, 1989.

DECISION DATE: October 6, 1989.

DECISION: Appeal Dismissed.

D E C I S I O N

This Appeal is from the Dartmouth Regional Assessment Appeal Court which refused to grant the Appellants a hearing. The Appellants failed to file a Notice of Appeal against the assessment on certain properties owned by them on Woodlawn Road and Penhorn Drive in the City of Dartmouth within the 21 days required by section 78 of the **Assessment Act**. Under Section

98(1), the Appellants then requested the Regional Assessment Appeal Court, City of Dartmouth Region, to grant a hearing to hear the appeal on the merits.

On April 18, 1989, the Regional Assessment Appeal Court refused to grant the Appellants a hearing on the merits stating "I can find no justification for the failure to file written notices on time". The Court further stated "the legislation is clear and the Appellants have failed to bring themselves within the provisions of Section 98".

This refusal was appealed to the Board on May 15, 1989. On September 6, 1989, the Board held a hearing to determine whether or not it had jurisdiction to hear this appeal.

In arriving at its decision the Board considers the following Sections of the **Assessment Act** to be relevant. The specific wording of each Section is contained in Schedule "A".

Section 98(1) allows the Regional Assessment Appeal Court to grant a hearing for a case to be heard on its merits, if the Appellant satisfies the Court that he had been prevented from appealing the original assessment within the required time limit of 21 days.

Sections 99 and 100(1) provide for an appeal to the Nova Scotia Municipal Board by any person who has been aggrieved by a decision of the Regional Assessment Appeal Court.

Section 101(1) sets out the duties of the Board in an appeal and requires that the Board shall inquire into the matter "de novo".

Section 101(2) gives the Board all the powers of the Regional Assessment Appeal Court.

Sections 89(1) and 91(1) detail some of the powers of the Regional Assessment Appeal Court and they are very specifically confined to matters of valuation, assessment roll and classification.

Section 108(1) deals with applications to the Supreme or County Courts on questions relating to assessment but specifically excludes questions of valuation, assessment rolls and classification.

In addition to the foregoing sections of the **Assessment Act**, the Board has read the following cited cases.

Raymond MacKay v. Director of Assessment (1984), 3-A MBD 303, deals with an appeal of a determination of the Regional Assessment Appeal Court relating to an application made under Section 91 of the **Assessment Act** concerning a late filing of a notice of appeal.

Ballou v. Director of Assessment (1984), 3-A MBD 375 was an appeal regarding a change of use tax. However, the decision centered around the Board's jurisdictional powers.

Adsheen Properties Limited v. Director of Assessment (1988), 7-A MBD 17 again dealt with the late filing of a notice of appeal and a refusal to grant a hearing under Section 98(1) by the Regional Assessment Appeal Court.

In all three of these cases the Board declined to accept jurisdiction to hear the appeal because the matter being

appealed was, in the opinion of the Board, a jurisdictional decision of the Regional Assessment Appeal Court and as such not reviewable by the Board.

The Ballou case was appealed to the Appeal Division of the Supreme Court - Ballou v. Municipal Board (N.S.), Antigonish County and Director of Assessment (1985), 70 N.S.R. (2d.) 73. The Supreme Court stated in this case that, although they felt the Regional Assessment Appeal Court was in error in declining jurisdiction to hear the appeal, the Board was correct in its decision to decline to hear the appeal because the matter was a jurisdictional matter at the Regional Court level and not reviewable on appeal to the Board.

The Board has also read Director of Assessment and Halifax v. Lord Nelson Hotel Ltd. (1985), 70 N.S.R. (2d.) 301. The facts are somewhat complicated but the references which relate to this appeal center around the interpretations of the powers of appeal as provided under Sections 99 and 108 of the **Assessment Act**. In considering this case the Board also read to the comments of His Honour J.P. OHearn in his decision Dartmouth Yacht Club v. City of Dartmouth (1979), 32 N.S.R. (2d.) 285 which was cited in the Lord Nelson Hotel decision.

As raised by counsel for the Appellant, the Board read Re Attorney General of Canada v. Cylien (1973), 45 D.L.R. (3d.) (Fed. C.A.) 590 which examined a definition of a "decision". The Board also read Re Hopedale Developments Ltd. and Town of Oakville (1965) 1 O.R. C.A. 259, which discusses reasons for

rejection of previous decisions as a precedent.

In this appeal the Board again is asked to review a situation where a Regional Assessment Appeal Court has declined to arrange a hearing for an assessment appeal under Section 98(1).

The Board notes that the wording of this section is somewhat different than any other sections of the Act which relate to hearings, appeals and decisions. It states in part:

> "If any person shows...to the satisfaction of the Regional Assessment Appeal Court that he has been prevented by absence, illness or other sufficient cause from appealing from the assessment...the Court may grant such a person a hearing and arrange a sitting of the Court to hear the appeal."

This section does not refer to right of appeal or issuing a decision but uses words such as "person shows", "may grant" and "arrange a sitting".

Sections 99 and 100(1) of the Act appear to automatically allow a person the right to appeal any decision of the Regional Assessment Appeal Court to the Board.

The question then arises as to whether or not a determination under Section 98(1) is, in fact, a decision as contemplated by Section 99. If this is so, is such a decision appealable to the Board and does the Board have the power to deal with it?

Sections 101(2), 89(1) and 91(1) seem to restrict the powers of the Board to very specific matters.

Section 98(1) could also be taken as a power which could be assumed by the Board. If 98(1) is a power of the

Regional Assessment Appeal Court, is it a power contemplated by Section 101(2) to be assumed by the Board?

Reference to Section 108(1) further complicates the issue of what matters are appealable and to whom an appeal or application can be made. The argument and confusion seem to center around the phrase "any question relating to the assessment" and what matters are contemplated by this wording. As changes in assessment roll, valuation and classification are specifically excluded it could be inferred that these are the only matters for the Board to consider. As the Section includes the words "any question", it could also be inferred that this section was included in the Act to provide an alternate or duplicate method of an appeal for this same matter.

The Lord Nelson Hotel case previously cited discusses Section 108(1) extensively and concluded that matters relating solely to jurisdiction do not fall within the meaning of Section 108(1). Whether or not the Appellant has a right to apply under this Section is not before the Board. The jurisdiction of the Board to hear an appeal from a decision under Section 98(1) is. The Board will confine its considerations thereto.

The Board in its past decisions has been consistent in its interpretation that any application to the Regional Assessment Appeal Court under Section 98(1) and any decision or determination of that Court is a jurisdictional matter and as such is not subject to review by the Board. The Regional Assessment Appeal Court under Section 98(1) has the discretion to

either refuse to arrange a sitting of the Court to hear an appeal or, if satisfied, to arrange for such a sitting. The Board in the past has always considered this to be a jurisdictional issue.

The Regional Assessment Appeal Court has the jurisdiction to arrange to conduct its own sittings. The Board has no power to review this.

The Regional Assessment Appeal Court, in its decision, stated the following in the opening paragraph:

> "This was a hearing under Section 98 of the Act to determine whether there was sufficient cause for the appeal notices being filed late, so as to enable the Court to assume jurisdiction to hear the appeal on the merits."

Council for the Appellants termed this as "an unfortunate wording". Nonetheless, the Court obviously felt it was dealing with a jurisdictional matter and as already stated the Board's previous decision have supported this view.

The Board's consideration in deciding that determinations of a Regional Assessment Appeal Court are a jurisdictional matter are well documented in the cases cited for this appeal and the Board will not repeat them here.

The Board has carefully reviewed these considerations in addition to the reference to the definition of "decision" included in the Cylien case cited above. The Board sees nothing in these cases or in any of the argument presented during the hearing or included in the memorandum of law of the Appellants which would cause it to substantially change its mind. The Board is of the opinion that a determination under Section 98(1)

of the **Assessment Act** is a jurisdictional matter and not appealable to the Board under Section 99.

There was no disagreement by any of the parties that the Board has no jurisdiction to review the Regional Assessment Appeal Court on matters of jurisdiction. Therefore, the main issue to be determined by the Board was whether or not matters under Section 98(1) are of a jurisdictional nature or not. The Board has now done so.

It was suggested by counsel for the Appellants that it was perfectly within reason for the Board to, in fact, change its mind relating to previous decisions and cited case law in support. The Board agrees that this is correct. The Board believes that this would apply in circumstances where new evidence or factors to be considered are presented which had not been previously presented or argued.

Unless it can be shown that there was a substantial fact or argument not considered by the Board in the cases cited for this appeal the Board does not deem it to be appropriate to, in effect, change its mind. The Board does not see any new argument in this appeal.

If the Board is in error in its interpretation and does have jurisdiction to hear this appeal, the Board wishes to look at what its powers might be in such a situation.

Section 101(2) gives the Board all the powers of the Regional Assessment Appeal Court. Sections 89(1) and 91(1) define some of the powers of the Regional Assessment Appeal

Court. As already stated, these all relate to matters of assessment value, classification and assessment roll and are of a very specific nature.

It is argued that the Board has the same power as granted to the Regional Assessment Appeal Court under Section 98(1). If this was accepted as correct then what procedures would be followed by the Board?

Firstly, it would hold a hearing to hear evidence to determine if it is satisfied as to why the Appellants have been "prevented by absence, illness or other sufficient cause from appealing from the assessment". Should the Board determine that it was not satisfied, presumably the matter would end there or be appealed, on leave, to the Appeal Division of the Supreme Court of Nova Scotia.

Should the Board determine that it was satisfied, based on the evidence submitted and that the Regional Assessment Appeal Court was wrong, then what could it do? The Regional Assessment Appeal Court has the power to grant a hearing and arrange a sitting of the Court to hear the Appeal. Does the Board have the right to set the matter down and grant a hearing in the Regional Assessment Appeal Court? The Board does not believe it has this power.

If the Board cannot send the case back to the Regional Assessment Appeal Court then the Board must hear the case itself. This was the position argued by Counsel for the Appellant. Section 101(1) requires the Board to inquire into the matter de

novo. Black's Law Dictionary (5th edition) defines de novo as "a new, fresh, a second time". It further defines a hearing **de novo** as "generally a new hearing or a hearing for a second time contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing". These definitions certainly contemplate that the merits of the case have previously been heard in another forum.

In this case a previous hearing has not been held. The facts relating to the assessment have not been heard at the Regional Assessment Appeal Court level and therefore it is impossible for the Board to heard the case "de novo". The Board does not accept the argument that the refusal of the Regional Assessment Appeal Court to arrange to hear the appeal was a hearing of the whole case.

In summary, the Board has determined that any matter before the Regional Assessment Appeal Court under Section 98(1) of the **Assessment Act** is a jurisdictional matter and therefore not reviewable on appeal to the Board. Even if it were appealable to the Board, the Board does not have sufficient powers upon which to dispose of the matter.

Neither party addressed the matter of costs relating to this appeal. Due to the circumstances surrounding the appeal, and the subject matter related thereto, the Board is not prepared to award costs to either party.

The Appeal is dismissed and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 6th day of October, A.D., 1989.

MICHAEL G. JOHNSON,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

TOWN OF WINDSOR v. DAVID CLEYLE

ASSESSMENT - RESIDENTIAL - DETERIORATION OF THE NEIGHBOURHOOD-COSTS - MUNICIPAL BOARD ACT s. 27(1)(ba).

D.C. appealed his $60,300.00 residential assessment to the Regional Assessment Appeal Court arguing that his neighbourhood had deteriorated. The Court agreed and reduced the assessment by an arbitrary 25% to $45,200.00. The Town appealed. The Board accepted the evidence of the assessor and increased the assessment to $50,000.00. The Director of Assessment asked for his costs.

HELD: The Appeal is allowed without costs.

The Board agreed with the calculations in the Appraisal Report including the allowance for locational obsolescence.

The Board finds no merit in the argument that the Director should recover his costs from the Town. The Director is a party in every assessment appeal and as such is expected to prepare which usually involves the preparation of an Appraisal Report. The Assessment Act permits the Director opportunities to change the assessment during the various stages. This was not done. The Town had no choice but to appeal the decision and was a successful appellant.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act by the **TOWN OF WINDSOR** from a decision of the **HANTS COUNTY REGIONAL ASSESSMENT APPEAL COURT** dated April 24, 1989, which reduced the 1989 residential assessment on property owned by **DAVID CLEYLE** at 228-230 Grey Street, Windsor, from $60,300.00 to $45,200.00.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: BARRY ALEXANDER, LL.B., for the Town of Windsor;

DAVID CLEYLE, on his own behalf;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: September 27, 1989.

DECISION DATE: October 12, 1989.

DECISION: **Appeal Allowed.**

D E C I S I O N

David Cleyle appealed the 1989 assessment on his home at 228-230 Grey Street, Windsor, to the Hants County Regional Assessment Appeal Court. The assessment had been set at $60,300.00. He argued that the neighbourhood had deteriorated thereby affecting the value of his property.

The Regional Assessment Appeal Court agreed and reduced the assessment to $45,200.00. The Court noted that it had

difficulty "in coming to a realistic value of the property" and then stated:

> "The Court has somewhat arbitrarily arrived at a reduction of 25% which would set the assessment at $45,200.00".

The Town of Windsor appealed the decision to the Board. As required by the **Assessment Act**, the Town gave notice to Mr. Cleyle and the Director of Assessment.

The Director of Assessment instructed S. Clair Peers, Senior Assessor to investigate and prepare an Appraisal Report which was filed as the sole exhibit at the Board's hearing.

In preparation of the Appraisal Report, Mr. Peers surveyed the neighbourhood and contacted the police. There has been an increase in the number of older homes converted to multiple family units. There has also been an increase in the crime rate in the area which includes Mr. Cleyle's property.

Mr. Peers is now satisfied that the original assessment of $60,300.00 was too high and that the proper 1989 assessment is $50,000.00. In arriving at the figure Mr. Peers relied on the Cost Approach. The Income Approach was not applicable since it is an owner-occupied home. The Direct Sales Approach, usually the most reliable indication of market value, was not used by Mr. Peers since there was no reliable market data upon which to make comparisons.

Mr. Peers was the sole witness at the Board hearing. All parties accepted $50,000.00 as the assessment. The Board has reviewed the Appraisal Report and is in agreement with the

calculations, including the various allowances used, such as locational obsolescence. The Board is satisfied that $50,000.00 is a more appropriate value for this property.

The Board allows the appeal and sets the 1989 assessment at $50,000.00. An Order will issue accordingly.

Mr. Duplak, on behalf of the Director of Assessment argued that the Director should receive his costs despite the Town being successful in the appeal. He based his argument on the fact that the sole evidence was that of the assessor. He noted that the Town hired no expert and argued that without the assessor's report and evidence the Town could not have proceeded.

The Director of Assessment is by virtue of Section 27(1)(ba) of the **Municipal Board Act** a party in every assessment appeal. As a party, the Director is expected to prepare for the hearing. In most cases, this preparation will include the preparation of an Appraisal Report.

In this case the original assessment has been found to be incorrect. Peers' Appraisal Report established that the appropriate assessment was more than $10,000.00 less than the original assessment.

The **Assessment Act** permits the Director of Assessment to reduce an assessment before the Appeal Court hearing. In this case, the Director did not avail himself at this stage to correct the erroneous assessment. At the Regional Appeal Court hearing evidence could have been adduced by the Director to establish a proper assessment. Instead the Court had to rely on

an arbitrary figure.

Given that the Court stated that it was setting an arbitrary amount for the assessment, the Town had no choice but to appeal. By appealing, the Town was forcing the Director to review the original assessment and prepare an Appraisal Report.

The Board finds no merit in the argument that the Director should recover his costs from the Town in this case. The Town was a successful appellant. The Board exercises its discretion on costs and directs each party to bear his own costs.

DATED at HALIFAX, Nova Scotia, this 12th day of October, A.D., 1989.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

PARK PROJECTS LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - MARKET VALUE - DIRECT SALES COMPARISON APPROACH - LANDLOCKED VACANT LAND - COSTS - ASSESSMENT ACT ss 38(1).

The decision follows a successful appeal of the Board's first decision (6A M.B.D. 185) by the Director of Assessment. The vacant property is landlocked and has neither road frontage or access to a public road. At the original hearing the assessor argued the assessment should be $3,600.00. The Board rejected this and set the assessed value at $100.00. The Appeal Court held the Board had erred in failing to determine whether the assessor by using direct sales comparisons and making certain adjustments had complied with Section 38 of the Assessment Act.

HELD: The appeal is allowed. The market value for assessment purposes is $1.00. Costs for an adjourned day awarded to the Appellant.

The Appellant proved to the Board that the subject property has no present market value to others and therefore the assessor's value of $3,600.00 was wrong. The comparables used by the assessor all had usable economic road access but the Appellant's property does not. Some land, or its uses, is so different from the comparison land, or its use, that the land may be too remote in likeness to constitute an appropriate comparable for valuation for assessment purposes.

The direct sales comparison is an appropriate assessment valuation technique but does not handle the problem when the value is contradicted by evidence of the actual market value. The uniqueness of the subject property prevents it having a market value of any but a nominal amount.

The value arrived at by finding highest and best use has no determinative application in assessment cases.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal by **PARK PROJECTS** LIMITED, from the decision of the Nova Scotia Regional Assessment Appeal Court, Halifax Assessment Region, dated May 13, 1987, respecting the assessment of 2.1 acres of land located on Herring Cove Road in the City of Halifax.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: ROBERT E. NOLAN, a principal of the Appellant, **Park Projects Limited**, representing the Appellant;

RANDALL R. DUPLAK, Q.C., for the **Director of Assessment**, a Respondent;

MARY ELLEN DONOVAN, LL.B. and BARRY K. ALLEN, LL.B. successively for the **City of Halifax**, a Respondent;

CLYDE A. PAUL, LL.B., for the **Nova Scotia Municipal Board**

Original decision: December 17, 1987;
Appeal Division Decision: September 15, 1988
Reargument: November 8, 1988 adjourned to May 1, 1989
Decision #2: October 12,1989:Appeal Allowed.

DECISION # 2 MADE PURSUANT TO APPEAL DIVISION ORDER

RECAP OF PROCEEDINGS TO DATE

This is an assessment appeal. The Regional Assessment Appeal Court on appeal from the assessor's assessment set the assessment at approximately $3,600.00. The City did not attend that hearing. The Owner appealed that assessment to the Board. The Board, after a full hearing, allowed the appeal and set the assessment at $100.00. The City did not attend that hearing. The Director appealed the Board's decision. The City attended both the successful leave application and the Appeal hearing. The Appeal Division

allowed the appeal and sent the matter back to the Board. This decision is the Board's attempt to follow the directions of the Supreme Court, Appeal Division, set out more fully in Duty infra.

DUTY OF BOARD PER DECISION OF APPEAL DIVISION

To make "a proper determination, namely, whether what the assessor did by using direct sales comparisons and thereafter making certain adjustments complied with the statutory requirements of s. 38 of the Act."

SHORT ANSWER

The Board determines that what the assessor did, by using direct sales comparisons and thereafter making certain adjustments, did not comply with the statutory requirements of s. 38 of the Act.

SHORT REASONS

S. 38 of the Act says "all property shall be assessed at its market value, such value being the amount...if it were sold...in the open market by a willing seller to a willing buyer. " The principle of uniformity must also be applied in setting the value.

The Appellant proved to the Board's satisfaction that the subject property had no present market value to others on the Director's value determination date.

By using direct sales comparisons and thereafter making certain adjustments, the assessor valued the subject land at $3,600.00. Since this was different than the $0.00 market value to others and the $1.00 value to the Appellant as a purchaser (The Board had found that value as a fact from the evidence before it), the appraiser's $3,600.00 value had to be wrong.

EXTENDED REASONS SETTING OUT THE ARGUMENTS OF THE PARTIES, THE LAW CITED TO THE BOARD, AND THE REASONING PROCESS USED BY THE BOARD IN ARRIVING AT THE ABOVE RESULTS

PROCESS

On receiving the decision of the Supreme Court, Appeal Division, and its accompanying Order, the Board thought how best it could accommodate the Order. The Court ordered that "the matter be remitted to the Nova Scotia Municipal Board for its further consideration, having regard for the reasons for judgment given by the court."

The Board could see in the Order or decision no instruction here to have a rehearing and consequently did not rehear the appeal.

The Board contemplated filing a new decision in the light of the Appeal Division Order without further reference to any of the parties. Since the City of Halifax and the Board had no counsel present at the previous Board hearing,

and since both had counsel at the two hearings before the Appeal Court, and, since the City had been on the successful side in the Appeal Division, the Board decided to canvass the parties at a pre-hearing meeting as to the process the Board should follow, given the Order of the Appeal Division.

At the pre-hearing meeting, counsel for the Director and counsel for the City agreed that the Board needed assistance in following the decision of the Appeal Division. The Board welcomed and encouraged their assistance and decided to hear additional argument from everybody interested.

The parties had no objections to the recitation of the evidence contained in the Board's December 17, 1987 decision, but, of course, wished to be free to argue what factual conclusions should be drawn by the Board from the evidence. When evidence conflicted, the parties wished to be free to advocate to the Board which evidence it should accept, reject, or otherwise consider.

The Board felt such a process would help it follow its statutory mandate while obeying the Order of the Supreme Court, Appeal Division. It decided to follow the process it has just described.

The Board spent its time on November 8, 1988 considering, and then granting, the City's application to adjourn because City counsel entrusted with the conduct of this appeal had become, just before that date, unable personally then to proceed with argument.

On that day (and subsequently), the Appellant asked for its costs thrown away. The Board reserved that decision, pending its final decision.

The City filed a pre-hearing memorandum with the Board just before its May 1, 1989 hearing. Both counsel for the Director and for the City commended to the Board in argument the memoranda each had filed before the Appeal Division. Mr. Nolan filed the Appellant's memo.

On May 1, all parties made representation to the Board as to the facts the Board should find, the law applicable to those facts, and, having done all that, what the Board should decide.

The Board has done as requested. The brief results are stated above. The rest of this decision sets out the reasoning of the Board in somewhat more detail.

FACTS

The Board sees no reason to repeat its recitation of the evidence contained in its decision (Park Projects #1) of December 17th , 1987. It merely refers to the evidence therein contained. Any findings of fact the Board needs to conclude its findings in this decision (Park Projects), will find support in the earlier decision and, behind that, in the transcript made of Park Projects #1.

MR. DUPLAK'S ARGUMENTS FOR THE DIRECTOR

Mr. Duplak conducted his arguments to the Board at its November/May hearing. In his presentations he made reference to the written arguments he had presented to the Appeal Division, both at its Chambers hearing on the Leave Application and on the Appeal, itself. He commended to the Board the authorities he had cited therein. He noted that the authorities he had cited there, applied here. He said they were set out verbatim in the materials sent to the Appeal Division with copies to the Board. He suggested the Board could look to those materials for his written arguments.

When the Board could not find some of those materials still on its file, Mr. Duplak kindly, on request, forwarded the filed materials he had referred to which the Board was missing.

In his presentation Mr. Duplak made arguments which the Board, for convenience of reference, will number. Mr. Duplak's arguments, as discerned by the Board, appear in numerical order in Schedule B to this decision.

(The Board has extracted such arguments, as best it might, from counsel's written and oral presentations. All appear in numerical order in Schedule B. They may appear as well in the text of the decision as they are dealt with by the Board.)

On the motion for adjournment, Mr. Allen represented the City. His arguments appear in numerical order in Schedule B right after Mr. Duplak's arguments. Those that the Board specifically dealt with appear in the body of this decision as well.

At the subsequent hearing Ms. Donovan represented the City. She made oral arguments which touched on the merits of the appeal as well as on the costs thrown away on the appeal. She also referred to her written efforts made before the Appeal Division and commended them to the Board's attention, as well. Where the arguments of Ms. Donovan exactly conincide with the arguments of Mr. Duplak, the Board has tried not to repeat them here. Where she differed from Mr. Duplak, made arguments in addition to his, or made arguments on points to which he had not alluded (with the same approach) the Board has attempted to list them.

Mr. Nolan also made argument. He submitted his arguments which are listed numerically in Schedule B as well.

DETAILS ON ADJOURNMENT & COSTS OF SAME

Since the Board had an additional hearing for argument and an adjournment of that hearing was made, the Board will try to deal with the costs issue related to that adjournment as if the hearing were correctly convened and its adjournment properly granted. Should the additional argument

hearing and the granting of its adjournment be questioned, the Board suggests the questioning might better occur elsewhere.

Since the City asked for the adjournment, the Board will cite its arguments first, then those of the other parties, and then outline the Board's thinking in response to the arguments presented.

At a pre-hearing conference, the Board canvassed the parties present as to its preference to have assistance in argument in order better to interpret the Order of the Appeal Division with which it had to comply.

As an active participant throughout all of the proceedings which lead to this decision, the Director agreed with the Board the process suggested might be helpful in disposing of the issues.

D.6."... the purpose is simply to hear legal argument today. as to what should be the value of the property based on the evidence that has already been presented to the Board....And the matter was just sent back to the Board to reconsider the evidence under proper principles of law."

Ms. Donovan expressed these arguments which bear somewhat on the issue of whether the Board should hold an argument hearing.

Don.1 "The City wasn't here at the Municipal Board."

Don.2 "...we probably here would like to be in a position to present additional evidence but the Appeal Division didn't give the opportunity."

Don.3 "...the City's primary interest here is...the legal aspect of this and how this Board in this case and in future is going to deal with...including elements of potential in considering the market value of property."

Mr. Nolan had no particular representations on this point.

Mr. Paul, Board counsel, took no objection to the Board hearing further argument.

The City had taken no previous opportunity to make its case directly to the Board. The Board, itself, felt need of further assistance in order better to interpret the Order of the Appeal Division with which it had to comply. The Board accepted these arguments and positions and decided that an argument hearing would be desireable and within the Appeal Division Order.

Given the usefulness and legality of the argument hearing, the Board would treat a motion to adjourn that hearing as it would treat the motion to adjourn any other Board hearing.

As to the granting of the adjournment, Mr. Allen, for the City opened thusly:

A.1 "...solicitor of record for the City...Donovan...tragedy in her family...she is not here and not able to be here today....we have not had time to assign the case to anybody else in our office for preparation we would request in the interests of presenting a fair case on behalf of our client... an adjournment...until we are able to prepare an adequate case, perhaps until Ms Donovan returns to work".

Ms. Donovan implied that Mr. Nolan consented to the adjournment. As a part of her Argument Don.6[c] she said of Mr. Nolan: "...when he...agreed to this May hearing..."

Mr. Duplak for the Director agreed to the City's request:

D.1 "I consent to the adjournment, Mr. Chairman."

Mr. Nolan, for the Appellant, did not consent to the adjournment in argument.

N.1 "I didn't want to appear unreasonable."

N.2 "I may or may not be here. I spend more than 1/2 of my time out of the City now."

The Board satisfied itself that Mr. Allen's representations as to the City Solicitors' department's inability to proceed with a substitute counsel on the date set for the hearing were factually correct.

If the Board had proceeded on its scheduled November date, the City would have been unable to properly prepare and present its arguments. Its line counsel was unavoidably unavailable. Its internal departmental process did not provide for proper late substitution of back-up counsel.

In her arguments, Ms Donovan said she was in hospital on November 4, 1988. The Board hearing was not scheduled until November 8, 1988 at 10.00 A.M. Ms Donovan is clearly personally not at fault for the City's admitted inability to proceed as scheduled on November 8.

The Board had strong feelings that a department of that size should be able to produce informed back-up counsel quickly in such circumstances.

The City was asked both by Nolan (prior to the hearing) and the Board (at the hearing) to adjourn a tax sale of the subject property to accomodate the completion of the argument hearing. Mr. Nolan used the immminence of the tax sale as another reason to resist the adjournment.

On this point he argued:

N.3 "... the City is in the process of selling this land for taxes sometines this month. ... they could hold off the tax sale...they declined to do it. ...they are being a bit arbitrary in this whole thing, forcing the sale."

Mr. Allen argued:

A.2 "...tax sale...unrelated matter."

A.3 "I don't have any instructions on the issue of the tax sale."

A.4 [After an adjournment to obtain instructions on the tax sale matter.] "...tax sale ...Monday... taxes for 1986,'87 and '88...appeal only relates to the 1987 assessment....Section 102 of the **Assessment Act**...specifically permits the collection of taxes to proceed"

On this point Mr. Duplak argued:

D.2 "...it would still appear to be more than three years taxes outstanding, and we are only talking about one year here."

The Board agrees with Mr. Nolan that the City's behaviour in pushing a tax sale with one hand while asking for an

adjournment of a hearing that bore on the amount of tax arrears with the other was "a bit arbitrary" to say the least. The Board is forced to concede the point made by both Mr. Duplak and Mr. Allen that Section 102 of the **Assessment** Act permits exactly that aggressive course of action. The adjournment could not have been refused because of the City's refusal to adjourn the tax sale. The Board felt it had no jurisdiction to grant the Appellant any relief from the imminent tax sale.

The Board, in passing, thanks Mr. Allen for his courtesy to the Board when, at the Board's request, he took an adjournment with a view to receiving instructions on the matter of the imminent tax sale.

There were no other arguments made in respect to the adjournment itself. The Board granted the adjournment requested by the City.

The present necessity of the adjournment rested solely on the City's inability to have ready back-up counsel. The size of the staff should allow for back up in such emergencies. Mr. Nolan was severly discomfited by the adjournment, through no fault of his own for which he could plan. This finding of the Board raises the matter of the costs of the day resulting from the adjournment.

Mr. Nolan made these arguments on the costs of the day thrown away:

N.4 "Mr. Chairman, my difficulty is that I am leaving for the U.S. and probably, I don't know the date, I have no plans to return here specifically in any point in time. I can make the arrang... I am concerned about the expense. It is going to cost me, I am staying at Kennebunkport. It is going to cost me. By the time I get to Kennebunkport... I don't mind doing that. I got to pay $580.00 for air flight ticket and rent an hotel. I don't know. Is there any way I could recover these expenses if I am successful? If I have to do it I have to do it. I find this...

N.5 "...can I at least recover my out-of-pocket expenses that I can document? They are going to run several hundred dollars. The alternative is to hire a lawyer locally and it is still goin' to run several hundred dollars. It is a Catch 22 situation for me.

N.8 "Ah, so no one misunderstands I am not asking you to comment on this, if I have to come back here I will be presenting as part of this hearing my recoverable expenses which are out-of-pocket for taxis, hotel bill, and plane fare to come up on May 1st. Everybody can deal with it but I will be putting it forth before the Board. So there is no misunderstanding."

N.9 "... I was brought back here with considerable expense as it relates in respect to a postponement requested by the City. ... there are plenty lawyers on staff down there. From my point of view is to proceed with this hearing last November.

N.10 "I'd like to ask [for] at least..my out-of-pocket expenses for an airplane ticket...plus 1 night's accomodation for being forced to come back here for this hearing. ... it could have been disposed of last November."

Mr. Nolan made this comment in his argument N.11 "...It would be necessary to come back...I would not be in the country for May 1st for any other reason than this hearing."

Mr. Duplak in making his unconditional consent to the adjournment in his argument D.1 is apparently not asking for his costs thrown away of the day from the City. Mr. Duplak did advocate that he should receive costs against the Appellant should the Director succeed in this appeal.

The Board assumes that the Director had costs for the day in question and would be claiming them as a part of his general claim for costs.

Mr. Allen said this on the matter of costs thrown away:

A.5 [As to costs of the day thrown away]"... it becomes a question of what makes sense in a case like this...I don't see that because the monetary basis of the appeal may not be rational that the municipality in turn should be ... [penalized]."

Later on Ms. Donovan dealt with this issue of costs of the day thusly:

Don.5 "...if the Director is successful so is the City but the City is not looking for costs."

Don.6 "...on the matter of costs that have been sought by the Respondent[sic]...
[a] an extremely unfortunate situation...my landing in the hospital on ...4th of November... should be taken into account ... an unpredictable event. ...
[b] Mr. Nolan has been in the City since November...presumably for other reasons...
[c] ... the City was available at any other time...after I got out of hospital...I was available for work after about the second or third week of November...
[d] But when he set agreed to this May hearing ... he intended to be in the City anyway. I gather he is in the City regularly on...other business."

The Board has reviewed all these arguments, considered the evidence and felt there existed these main alternatives on the question of the costs thrown away on the adjournment:

1. That there be no costs on any part of the hearing;
2. That the costs of the day on the adjournment be left with the costs on the result.
3. That the costs of the day be awarded to the Director and the Appellant against the City in any event.

4. That the costs of the day be awarded to the Appellant against the City in any event.
5. Should the Director receive costs against the Appellant that he not recover costs of the day against the Appellant in the general award of costs.

The Board has power to exercise its discretion in dealing with costs in assessment matters granted it by Section 22 of the **Municipal Board Act.**

The Board is not prepared to find at this part of its exposition of its reasons to decide that there be no costs to any party as to the whole appeal.

The Board feels that the costs of the day of this adjournment are easily severable from any general costs of the appeal both in time and in causation to allow the Board to exercise its discretion concerning the costs of the day thrown away and to award costs of the day in any event.

The City had minor costs from this appeal. It conceded that it wanted no costs whatsoever. This generous concession was carefully noted by the Board, and had the results of this decision been different, the Board would have been honoured the City's request. Such generosity will not necessarily be reciprocated, at least as to costs of the day thrown away.

The Director did not directly ask for costs of the day thrown away against the City. The Board, in its discretion, will also honour this implied request of the Director and award it no costs of the day thrown away against the City. By the same token, had the results of this decision been

different and had the Director been awarded costs as against he Appellant, the Board, in its discretion, would have reduced any award of costs by not allowing any costs for the day thrown away as against the Appellant.

Since, in the result, the Appellant won this hearing the costs of this hearing might have been awarded to it. Enfolded in that award, presumably, would have been the costs of the day thrown away on account of the adjournment and therefore would not have to be dealt with specifically in this decision.

The Board views the issue of costs of the day thrown away of the adjournment of sufficent importance, that, despite some of the immediately preceeding remarks, it should deal with them on their own merit.

The Board exercises its discretion and awards the Appellant its costs of the day of the adjournment thrown away in any event. The Board in so doing notes that, on both occasions, the Appellant had to travel from afar, that one such travel might have been at his own risk but not two, that he warned the City at the first hearing that he would be asking for such costs. The Board further feels that the City has a large enough staff of qualified counsel that it could have set a back-up counsel ready or, if necessary, the means to hire outside counsel if all inside counsel were previously engaged at hearings in Boards or courts superior in precedence to this Board. The City had a transcript of

the evidence taken at the first hearing. It had prepared and argued the matters of law involved in the Appeal Division. It had no opportunity or duty to call further evidence. Facts and law were readily available on its existing files with which to brief counsel, or so one would think.

In making this determination, the Board instructed itself to ignore the City's refusal to adjourn the tax sale as being inflammatory, and likely irrelevant, to the issue of costs thrown away.

Since the Appellant could not conveniently and cheaply attend a conventional taxation, the Board will look to the argument and determine an appropriate amount for the Appellant's costs of the day thrown away.

The hearing of the adjournment took the best part of a morning, only slightly less time than the argument hearing itself. Mr. Nolan was not asking for any costs other than his disbursements for his extra trip made through no fault of his own. (The Board, as one may see, has not accepted the City's exculpatory arguments on this issue.) To the Board it therefore makes little difference whether one looks to the actual disbursements of the first hearing or those of the second. They appear to be about the same. Mr. Nolan offered to send receipts for air fare return to Kennebunkport and one night's lodging in a hotel together with necessary transportation and meals. He said the return air fare was in excess of $500.00. In the absence of such slips, the Board

will estimate the necesary disbursements and allow the Appellant to recover against the City the amount of $600.00 costs of the day thrown away on the adjournment.

Even if the Board were to find for the Director and the City on the assessment issues of the appeal, it would have made the same award to the Appellant for its costs of the day thrown away on the adjournment.

The adjournment date was selected with especial reference to the needs of the Appellant, the Board, and Mr. Duplak and, to a lesser extent, the City.

Mr. Allen stated the City's position thus:

A.6 "After Christmas someone will be available from the City."

After the event of May 1, Ms. Donovan stated a capabiliity to try this issue in late November previous, and she alluded to Mr. Duplak's efforts to try the matter in the previous December. These arguments were served up after the event in argument in mitigation of costs and, of course, could have no bearing on the selection of the date of May 1st.

Mr. Duplak spoke to the date of May 1st as follows:

D.3 "The first is fine with me. The next three weeks are out for me in May."

Mr. Nolan made these two arguments as to date while not conceding the adjournment:

N.6 "... once we are over next Monday, we might as well be over Christmas."

N.7 "How about May 1st?"

The preferable date for the argument hearing was November 4,1988.

Due to the City's inability or failure to produce back-up counsel in the unfortunate emergency that arose, the Board could not use that set date.

Urgency left the consideration equation once the tax sale time scheduled for the Monday following November 8 passed. The City suggested that after the Christmas season they would be ready one way or another. Mr. Nolan was willing to postpone the hearing until after the Christmas season once the tax sale time scheduled passed.

Since this was likely to be a one day hearing or less, the Board on November 4 had time in November or December to sit on the hearing without interfering with its other scheduled events. The City, as seen from its arguments, wanted an adjournment but had no specific date in mind. It would only commit itself to a date after the Christmas season. It expressed its preference to have its case in the hearing conducted by its line counsel already assigned the case, Ms. Donovan.

The Board, in the light of the City's representations, suggested dates which appeared to come on or after January 1, 1989 and accomodated the preferences of Mr. Nolan, Mr.

Duplak, and the easy availability of the Board. Following these criteria, the Board set May 1,1989 as the date. The Board conducted the argument hearing on that date.

DISPOSAL OF OTHER ISSUES ARGUED

The Board asked who should start the arguments. Mr Duplak suggested:

D.5. "I was successful in the appeal. I will take the initiative and start."

No one objected to this suggestion, and the Board accepted Mr. Duplak's suggestion on the conduct of what was to this Board, a novel type of hearing. In retrospect, the Board feels that Mr. Duplak's suggestion worked well in practice and assisted in getting the issues canvassed fully before the Board.

Mr. Duplak explained the Director's position on the meaning of the Appeal Court's decision and order and how it should govern the actions of the Board.

D.6."[cited before on another issue]... the purpose is simply to hear legal argument today. as to what should be the value of the property based on the evidence that has already been presented to the Board....And the matter was just sent back to the Board to reconsider the evidence under proper principles of law."

D.7 "I not only think that you erred in saying that he used the highest and best use. We also went to the Appeal Court over your comment that ... p23 of the decision, second paragraph last sentence: 'The Board further notes that another method other than market data approach to valuation of this particular piece of land, landlocked as it is, may

have to be used by an assessor to arrive at more than a nominal market value.' And that was the reason...the main reason for our appeal was."

D.8 "...the market data approach was the only approach that could be used...the only three approaches to value, didn't know why you had to come up with a fourth one."

D.10 "...the Court says:

' The evidence of Mr. Caiger is crucial to the determination to be made by the board.

...

whether what the assessor did by using direct sales comparisons and making certain adjustments answered the statutory requirements. Section 38."

So they don't say you have to take his evidence carte blanche. But that his evidence is crucial in the determination that the Board must make."

Ms. Donovan does not try to elaborate on Mr. Duplak's exposition of the Appeal Court's decision and order. She did not dissent from his position but she presented her arguments in a positive mode as if made de novo. Her only comments noted by the Board are contained in her argument Don.2 [noted already above] which says

Don.2 "...we probably here would like to be in a position to present additional evidence but the Appeal Division didn't give the opportunity."

and her argument Don.4 which says

Don.4 "...I guess my thought on this is that my mind is cluttered with the reality [as opposed to the evidence.]"

Mr. Nolan was, for obvious reasons, silent on this issue. He seemed to prefer to honour the Appeal Court decision by ignoring it. Whether or not that was the case, he gave the

Board no direct assistance in argument how to apply the decision.

Having read the decision of the Appeal Division on more than one occasion, having read the Chambers decision of Macdonald, J.A. granting leave to appeal, and having read the Order directed to the Board from the Appeal Division, the Board is of the opinion that Mr. Duplak's arguments D.6,D.7,D.8, and D.10 fairly summarize the Appeal Division's instructions to the Board.

Ms. Donovan's statements in her arguments Don.2 and Don.4 seemed to indicate that the Appeal Division's guidance to the Board was correctly verbally put to the Board.

In any event the full text of the two decisions and the order of the Appeal Division is before the Board.

As the arguments are sometimes of a mixed content in the context of the development of this decision, the Board will here deal with what it believes to be the instructions to be taken:

1. That the Board reconsider the evidence under proper principles of law;
2. That Mr. Caiger's estimate of value, using the market data approach to value did not arrive at the highest and best use value suitable in expropriation cases but not in assessment cases.
3. That in the Board's determination of value "the evidence of Mr. Caiger is crucial to the determination to be made by the board ... whether what the assessor did by using direct sales comparisons and making certain adjustments answered the statutory requirements. Section 38."

With these instructions there is and can be no dispute from the Board or amongst the parties resolvable at this level of hearing.

Mr. Duplak went on to say that, despite the Appeal Division ruling, the Board does not have to accept Mr. Caiger's evidence carte blanche but that it is crucial in any determination the Board might make.

Given the decision of the Appeal Division, the Board might have been excused if it felt that it could only consider the evidence of Mr. Caiger and ignore all other evidence of value before it. Mr. Duplak does not think the Board is that limited in this case.

Is he correct in this?

Market value is a matter of fact.

Section 32(2) of the **Municipal Board Act** gives the Board authority to determine all matters of fact within its jurisdiction. Section 34 of the same act makes the finding or determination of the Board upon any question of fact within its jurisdiction binding and conclusive.

Under Section 35(1) of the **Municipal Board Act**, one may appeal on any question of jurisdiction or on any question of law. One might conclude from this excerpted legislation that an appeal under this section to the Appeal Division on a matter of fact is legally impossible.

The Appeal Division did not set its own value in this appeal. It did not expressly instruct the Board to have regard for the evidence of Mr. Caiger only. Given the clear legislative authority cited above, the Board feels Mr. Duplak's submission that the Board need not accept Mr. Caiger's evidence **carte blanche** but must consider it crucial in the performance of its duty to determine the market value of the subject property is a correct exposition of the Appeal Division's decisions and order in this matter.

In his argument D.11 Mr. Duplak appears to retract slightly from that position when he argues:

D.11 " The fact they said his evidence was crucial to this determination, I submit that it can't be dismissed as being the highest and best use and therefore not relevant. I think that is a finding of fact [sic] by the Appeal Court and the Board is bound by it."

The Board has already spelled out its understanding that the Appeal Division stated that Board erred as matter of law when it found that Mr. Caiger's valuation expressed the highest and best use of the property. The Board does not accept that the finding is a matter of fact since, as outlined above, the Appeal Division apparently, on an appeal from the Board, has no jurisdiction to determine any matters of fact. Had the Appeal Division made a determination of a matter of fact and embodied it it its decision as alleged by Mr. Duplak (and consequently been in a state of legal error), the Board could have only taken an academic interest

in such error. Insofar as the Board is concerned (in its position in the chain of greater events), the Appeal Division (unappealed itself) is legally incapable of being in error. The Board, in its academic perusal of the Appeal Division's decision, holds the opinion, for what it is worth, that what the Appeal Division decided in this instance was a finding of law and not a finding of fact as argued by Mr. Duplak.

Perhaps Mr. Duplak was arguing that it was a matter of fact that the Appeal Division had made a finding at law which was binding on the Board.

Perhaps, since this statement was extracted from oral argument, Mr. Duplak merely made a slip of the tongue and had meant to say "question of law" instead. The Board is sure Mr. Duplak is quite familiar with Sections 32,34 and 35 of the Municipal Board Act.

Even if Mr. Duplak meant and thought he was correct in what he said, the Board (while it would not have any option but to follow the academically wrong decision) holds the opinion that Mr. Duplak was, in this respect, not correctly interpreting the Appeal Division decision.

On this aspect of the appeal the Board agrees with the main theme of this argument of Mr. Duplak. The Board does not have to accept **carte blanche** the evidence of Mr. Caiger even though it is crucial to the Board's determination of

market value for assessment purposes of the subject property.

The facts of this case are generally fairly clear and where there is ambiguity or uncertainty they will be demonstrated from excerpts from the transcript later in this decision.

Both active legal counsel argued extensively which legal decisions, in addition to the Appeal Division decision herein, supplied the law applicable to the facts of this appeal.

At the hearing of the evidence in this appeal, Mr. Duplak's witness referred to the decision of Mr. Justice Cooper in the case of Bowater Mersey Paper Company Limited v. Digby County and Director of Assessment (1979) 33 N.S.R.(2d) 181 [1] in complimentary terms

p.59 L.15 "A. The 'cost of development approach' cannot be used in assessment purposes, and the reason being it incorporates the theory of highest and best use and in the case of law...Digby versus Bowater Mersey, in their decision stated that 'the valuation must be, for assessment purposes, must be based on present use as opposed to highest and best use', or in this particular appeal, it was a cost of development approach. That decision was based on that approach.

...

P96 L.5 A. No. It's a Supreme Court decision which said that...it dealt with the development of raw lands, woodlands into cottage lots.

...

L.10 A. No. It was a 'decision' based on a...specifically to this appeal, to the appeal of...Digby versus Bowater Mersey.

...

L.16 A. Well, it's case law and ...

...

L.22 A.Well, its 'case law' and case law is giving us direction as to how to deal with similar circumstances.

...

P.99 L.18 Q. Have you been able to locate the section that you're using as the authority for not applyiong the cost of development?

1.21 A. No. I can't identify it in here...I believe there are other cases, too. It's part of the assessment course which...course material refers to this case as being one of the reasons why we can't use the cost of development approach....P.100 L.1 It's like a consolidation of quite a number of the more important cases, the Sunlife case, and so on."

The Board has extracted Mr. Caiger's evidence of his understanding of Bowater$_1$ in dealing with Mr. Duplak's argument. The Appeal Division in The Director of Assessment v. Park Projects Limited and the City of Halifax S.C.A. 01899 (unreported)$_2$, at p3 of the filed decision said of Mr. Caiger's testimony:

"It is evident that he understood Bowater..."

Mr. Duplak did not seem in his arguments, this time, to feel too supportive of Bowater$_1$.

D.12 "...this decision finally puts to rest the Bowater decision... . lawyers so interpreted [it] that it went far beyond the parameters for which that decision stood for. The Bowater case simply stood for the proposition that highest and best use it's a method of valuing property for expropriation and not for assessment purposes. That highest and best use refers to speculative future possible uses of property."

D.52 "...Bowater...decision only stands for the following propositions: (1) that the highest and best use is not a proper method for valuing property for assessment purposes. (2) that consideration of the value of the land must not take into account speculative matters outside the assessment year."

D.53 "...Justice Jones dissented...

> 'He had to weigh the evidence, determine whether there was a market in the area for water frontage for recreational purposes...It is not the use the owner makes of the land to determine its value but the market.'

...Jones was correct in the statement of this principle and that this principle was not in conflict with the majority decision in...Bowater... ."

D.14 "[In Bowater] Mr. Justice Cooper does not use the word 'future'."

D.33 Mr. Duplak argued the Board could read Bowater and conclude that the suitable cottage property was so isolated that its presence did not enhance the value of the whole land.

Ms. Donovan dealt to some extent with $Bowater_1$ in these arguments.

Don.24 "... as far as the Bowater case goes ... all that was being dealt with there the balancing of the evidence in that particular case."

Don.44 "...Bowater... did not create a special form of "market value" specific to the assessment process."

Mr. Nolan had implicitly expressed some views on $Bowater_1$ in his cross-examination of Mr. Caiger. He also gave some interpretations in the arguments which led up to the Board's previous decision in this matter. The Board does not

reiterate those views here because it didn't then, and doesn't now, think them particularly helpful.

The Board notes the change from Mr. Caiger's expressed respect for the majority decision in Bowater[1] and the emphasis on distance from that decision both Mr. Duplak and Ms. Donovan wish to put between themselves and the majority decision in that case.

On rereading the decision of Cooper, J.A., the Board notes that the headnote reads in part, as follows:

"[p181] ... no value for assessment purposes should be attributed to the recreational potential of the lakes and streams.

...

Valuation principles - Current or present use - The Nova Scotia Court of Appeal stated that the concept of the highest and best use (from expropriation cases) should not be applied in assessment cases."

Cooper, J.A.'s remarks seem to the Board to bear out these excerpts from the headnote:

"[p195] In considering this issue of water frontage enhancement so-called I think it is important to keep in mind that the land here is not being expropriated but merely assessed for purposes of municipal taxation - a yearly process. ...
I cannot find here any evidence of prospect of change throughout the period of assessment.

This quotation relies for authority on the decision of Rinfret, C.J.C. in Sun Life Assurance Co. of Canada v. Montreal, [1950] 2 D.L.R. 785[3]. Apparently Cooper, J.A. selected which decision in Sun Life[3] he felt constituted the applicable law of Nova Scotia.

Our present Appeal Division (Clarke,C.J.N.S) in this case in Park Projects $_2$, at p1 of the filed decision wrote:

" In Bowater...[p3] Cooper, J.A. stated that the standard ofthe highest and best use applied for the valuation of land in expropriation cases should not be used when determining market value for assessment purposes. He said at p. 195:

> 'I think it is a mistake to take a concept particularly applicable to and understood in one situation and apply it to another. I would leave the concept to expropriation cases.' "

With this direct reference supporting Cooper, J.A.'s decision in Bowater$_1$, the Appeal Division panel exercising direct jurisdiction over this appeal has favourably passed on at least one aspect of that decision; decisively insofar as this Board is concerned in this appeal. With its favourable comment concerning Mr. Caiger's evidence and his understanding of Bowater$_1$, the present panel passed even a more general endorsement of the other majority aspect of that decision quoted above. The Appeal Division did not specifically criticise any aspect of Cooper J.A.'s decision in Bowater$_1$. From this perusal it appears the Appeal Division favours the propositions stated in Bowater$_1$. Consequently where Mr. Duplak's arguments tend to downgrade the effect of certain rulings the Board has extracted from Bowater$_1$, the Board is of the opinion that the decision of the Appeal Division in Park Projects$_2$ militates against his argument.

The Appeal Division has made favourable references to Bowater$_1$

in decisions other than this and subsequent to it. Ms Donovan's argument that Bowater$_1$ must be restricted to its own facts and has no general application therefore, in the opinion of the Board, fails.

If Bowater$_1$, unexplained, does not create a special form of "market value" for assessment purposes when it says

"[p195] In considering this issue of water frontage enhancement so-called I think it is important to keep in mind that the land here is not being expropriated but merely assessed for purposes of municipal taxation - a yearly process. ...
I cannot find here any evidence of prospect of change throughout the period of assessment."

the Board is unable to otherwise categorize the value supported by that case. The value arrived at, ignoring the value of the potential enhancement of a partial change in use, is the value Cooper, J.A. seemed to the Board to support. The Board cannot accept Ms. Donovan's argument Don.44.

The Board must, and does accept, that the value arrived at by finding "highest and best use" has no determinative application in assessment cases.

"In Bowater...[p3] Cooper, J.A. stated that the standard ofthe highest and best use applied for the valuation of land in expropriation cases should not be used when determining market value for assessment purposes. He said at p. 195:

" 'I think it is a mistake to take a concept particularly applicable to and understood in one situation and apply it to another. I would leave the concept to expropriation cases.' "

The Board, generally following the theme it has extracted from Mr. Duplak's arguments, retreats from its treatment of **Bowater**[1] and gets on to more generalized arguments.

D.13 "... the best indicator of value for the property is the sale of the property."

D.15 "... when you are talking about market you are talking about current market conditions that prevail in an area."

D.42 "The Board is required to arrive at market value."

D.45 "... the sale of a property is a direct estimate of a value that the market places on the property."

D.49 "...it is entirely possible for a property to have a value in use to owner which is greater than its market value."

Ms Donovan added nothing to these points.

Mr. Nolan argued:

N.17 "I think the real issue is the value of the land as of the date of the appraisal."

The Board agrees with all three of these arguments. The Board holds the opinion there is nothing in these three arguments contradicting the instructions to the Board contained in the decision of **Park Projects**[2].

The Board feels that its decision herein resulted from the market value proven by Mr. Nolan in his attempts to sell the property.

Mr. Duplak in the following arguments attempted to denigrate Mr. Nolan's testimony concerning his efforts to sell the land.

D.16 "For assessment. This is what I was using in the Appeal Court as my example. Current market conditions determined the value of that land and that that land was valuable as commercial land based on the current market conditions."

D. 17 "...there were offers for that land."

D. 18 "...[if] the land has got no value, then any offer has to be a serious offer."

D.19 "A telephone inquiry is an offer."

D.20 " It is clear that he had offers. ...His own word is there were offers. ... he said they were offers"

D.37 "... the Board...it's looking at valuation from a subjective point of view of Park Projects. "

D.38 "... if you are going to value this property based on looking on Mr. Nolan's evidence. His evidence still has to fall within one of the three approaches to value."

D.39 "... we don't know what it didn't sell for."

D.40 "...I don't think that you can take his words: 'I don't consider them serious offers.' and say offers isn't an offer of value."

D.28 "... go back and read the record."

Ms. Donovan pushed the same theme.

Don.16 "...Nolan..., other than 0, didn't provide any numbers."

Don.17 "... he...tried to sell it to the City of Halifax, that's back in '72."

Don.18 "... he lumps the City in with C.M.H.C...that wasn't an offer to sell to the City."

Don.19 "...without that kind of hard evidence [specific dollar offers for the land and a willingness to entertain any dollar positive offer], there is nothing in what Mr. Nolan had to say."

Don.22 "...he did not indicate...that he was open to any offer whatever on this property."

Don.23 "We don't know what price was identified on the listing."

Don.27 "[as to Nolan's listing of several properties together]...he's not providing us the breakdown of what the split should be."

Don.28 "I think you can only look at the record as it is."

Mr. Nolan has this to say in argument on the point of his sales efforts.

N.26 "... there are situations where land has a negative value. Now, they are not common, but they exist."

N.27 "This was a very troubled piece of land... . I think it really supports my case that the land at the date of assessment really did not have a market value...we tested the market and the market didn't respond."

Much more tellingly, Mr. Nolan in his evidence in the hearing said this:

"P.16 L4...the land really has no value at the...date there is no evidence that there's any value of the lands of the abutting property owners to the north and west...

L8 Well, the land was offered to sale to Central Mortgage and Housing and the City of Halifax in 1972. I personally offered it for sale; I discussed it with City officials at the time; I discussed it with CMHC at the time and I was told they were not interested in acquiring this land...

L.14 Well, it wasn't a matter of any 'price'. We never got to the matter of price,. they said, 'We're not interested in acquiring it.'

...

L.17 The explanation given to me, for what it was worth, was that they had no statutory authority to acquire land beyond their immediate needs.

p.18 L.2 My belief is that there is no such street as 'Roy Street.'

L.8 I believe it was owned by an Oakley at the effective date of the assessment.

...

L.10 The value...is in the range of...$25,000 was the value of that land.

...

L.19...it's offically Brookfield Brothers...

...

L.22 Yes, it is for sale. ...

P.19L.1 ...the figure quoted was ... $650,000

P.22 L.19 I have an opinion that the best, because the land has no use, it has a nominal value not to exceed ...$1. It has no market value in my opinion because there is no use for the land in my opinion. The third point I would like to make is that we did offer the land for sale in the period of 1982 through a real estate company on multiple listing, and there were no offers or enquiries to buy the land. We again offered...in 1984, we again offered the [P23L.1] land to another real estate company with the same results. There was no interest, no offers to purchase, no serious inquiries with respect to the land. In 1985 we did contact the adjoining property owners to the east and south and they...at that time indicated to us they were not buying land. In fact they were selling land. ...the Blunden land has been for sale for several years, more than four, and...the Oakley property has been sold some time in the past two years,so they were not...interested in acquiring this land.

P.42 L.15 Well, we had no offers, and the reason I say 'serious inquiries', I believe we might have had telephone inquiries which I do not believe was a 'serious inquiry'.

Mr. Nolan made these statements while testifying. They were uncontradicted by other witnesses. Some of the people he purported to have dealt with must still have been

available to contradict him, if contradiction were possible. None was called. Mr. Nolan's demeanour under oath impressed the Board as as being truthful and knowledgeable about his company's land.

In argument Mr. Nolan said:

N.27 "This was a very troubled piece of land... . I think it really supports my case that the land at the date of assessment really did not have a market value...we tested the market and the market didn't respond."

Mr. Duplak's argument D.16 finds no objection from the Board.

His D.18 argument also fits the non-objectionable category. There were in fact, no offers. Mr. Nolan said so. He did not contradict himself on this point. Neither did anyone else in testimony. The Board believes him.

The record does not support Mr. Duplak's D.17 and D.41 arguments that there were offers for the land and his D.18 argument that he [Nolan] said there were offers. The Board listened to Mr. Nolan's testimony in the first place. Fully cognizant of its rights and duties and grave responsibilities under Section 34 of the Municipal Board Act, it listened carefully to argument for the parties at both hearings and especially the strong arguments of Mr. Duplak that the testimony was otherwise. It read, and reread, the transcript of the evidence. After all this the

Board still concludes that there were no offers to buy the subject land.

As to his argument D.19, the Board concedes a telephone inquiry can in some instances constitute, if not an offer, at least some indication of value. The Board is satisfied, from the study mentioned above, that the telephone inquiry[ies] received by Mr. Nolan were of insufficent substance to make any impression on Mr. Nolan, an obviously willing seller. The Board said he was obviously willing since he recognized the uselessnes of the land in its present state to anyone but an abutter or someone else who could obtain access. At this same time the Appellant was in debt and, presumably, would need to service that debt from revenues including the provident sale of all or part of its lands.

In his argument D.37, Mr. Duplak suggests the Board is looking at the value of the property "from a subjective view of Park Projects." That it is the view of Park Projects is not in doubt. That it is a subjective point of view is very much in doubt. In 1972 Mr. Nolan received total rejection even before price was mentioned from his abutter (C.M.H.C/CITY] who was actively engaged in providing multiple housing in the matter and who could actively use his land (after rezoning) and who could provide the Appellant with its most easy physical access. [The Board will deal in more detail with access later.] In the two

subsequent general listings in the early '80's, the opportunity of this abutter to purchase this land must have again arisen. (No listing agent of this landlocked property in his right mind would avoid contact with the abutters when looking for buyers.) In any event this abutter made no offer to purchase during the exposure to sale of the subject property.

The Brookfield property abutter which had frontage on the Herring Cove Roard was not buying but was selling. It was commercial. Not residential. The purchase price mentioned was out of the means of the Appellant to buy, at least as an enhacement (or even access for) the subject property. This route out of the Appellant's problem was, in any practical manner, blocked.

The Oakley property had been sought as a way out by the Appellant. This property would have given the land access to the Herring Cove Road as well. Mr. Nolan said the Appellant was smelling around the Oakley property to buy it at around $25,000.00. No sale arose to the Appellant from these sniffs. A year or two later the property was sold to others who then built a duplex on the Oakley lot. This price and this new building removed the Oakley lot as a source of road access for the subject property. By the same token, the owner for the time being of the Oakley lot cannot regard the subject property as a practical acquisition to add to his roadside lot for development. There is not enough

acreage in the subject lot to warrant the destruction of the new building on the Oakley lot to provide street access to the subject property for multiple residential development on it.

The only remaining abutting land is (as will be seen from the aerial photographs in evidence) still treed and very remote in time for development. Its owners would have no present need for the subject land because of the remote prospect for development. The land ownership on this side of the subject property is so diverse between the subject property and any public highway, that any access for the subject property to a public highway is likewise remote in time.

These are objective, not subjective, bases for Park Projects valuation of the property now being considered.

The logical purchasers of the subject property have been systematically sought by the Appellant. His most logical purchasers, the abutters have demonstrated their present lack of interest in the property. The rest of the buying public have been sought in a conventional manner by listing "offers solicited" with no offers made. Mr. Nolan has proven the negative that the Appellant's property has no present market value. In so doing he has complied with Mr. Duplak's argument D.38 in that he has made a direct sales effort and arrived at, the most, a zero market value. No one will buy. The indirect methods used by appraisers and others in

arriving at market values for land for whatever purpose are merely substitutes for arriving at market value where no sales are available to prove value. In the Board's opinion, Mr. Nolan by exposing the property for sale in the manner he did proved directly that the property had no value to others. As Mr. Duplak said in his argument D.39 "We know what it didn't sell for." That is its market value to others.

Ms. Donovan's arguments deserve some consideration as well. Don.16 "... Nolan, other than 0, didn't provide any numbers." In the view of the Board, Nolan directly proved the market to others at the maximum of 0.

Her arguments Don.17 and Don.18 argued he didn't try hard enough to sell to the public abutters, and in any event had made his effort back in '72. How careful Mr. Nolan was in sorting out the C.M.H.C./City relationship, in the view of the Board, is is of small importance compared to the unequivocal rejection his overtures received. Had either or both of these public bodies wished to change their former spurning tactics and to purchase these lands they had at least two public opportunities to do so when the properties were again exposed to sale in the early '80's under general listings. They did not do so on the record of this case.

As to her arguments Don.19,22,23, and 27, Mr. Nolan says, and is not contradicted on the evidence, that he was open to

any offer and that no offer was made. The Board believes him when he says this.

As to her argument Don.28 (and Mr. Duplak's similar argument D.28) the Board did refer to the record most extensively. In doing so, the Board only received confirmation that its recollection of the oral testimony was, in the main, accurate.

Mr. Duplak argued there were other indicia of specific value for the property.

D.21 "...$80,000.00 mortgage...an indication of value to the owner, ..."

D.22 "... he listed it at $50,000.00."

D.25 "... it has a value as investment purposes."

D.26 "It still has value to an abutter."

Ms. Donovan took a slightly different approach.

Don.14 "...the impression that the City has is that the Board's gut reactions [two] to this whole situation originally was that a property in the location...has to have a value something more than nominal...[and] you ... ignore that mortgage of $80,000.00... almost totally."

Don.15 "...if the right circumstances exist, property out that way does have value."

Mr. Nolan's views on these topics already have been exposed either in argument or his evidence.

The $80,000.00 mortgage is some indication of value, at least to the owner and, perhaps to some lender. The

Appellant has demonstrated some financial instabiltiy in this matter. The Board notes on this point:

1. the borrowing on multiple properties by way of a blanket mortgage for $80,000.00;
2. the allowing of the property to get within a weekend of a tax sale auction of the property;
3. the peristent inquiries by Mr. Nolan on the subject of costs, including the trifle of $50 he had originally been awarded by the Board;
4. the lack of enthusiasm in pursuing the Oakley property when it was available and on the market. The Appellant said it was willing to buy for $25,000.00. The property didn't sell for some time later, and then only for $29,000.00. At that small percentage difference in price, a negotiated sale should have been possible between a willing (and able) buyer and an obviously willing seller. The Board wonders whether the Appellant's failure to display sufficent effort to close this sale resulted to some extent from financial weakness of the Appellant. If the Appellant were somewhat financially unstable, as the Board suspects, then the blanket mortgage made good sense to the borrower since it staved off for a better day the financial pressure while the lender obtained more security. Financial pressure is a probable and common cause for a blanket mortgage

Be that as it may, Mr. Nolan's explanations and the number of different pieces of land contained in the blanket mortgage, suggest to the Board only that the subject land has some value as a security. The Board cannot determine any real determinate amount from this fact which would enable the Board to determine market value of the subject land from the fact of the existence and the amount of the blanket mortgage. In this way the Board accepts as essentially factually correct Mr. Duplak's arguments D.21 and, to some extent, D.25. The second half of Ms. Donvan's argument expresses the Board's opinion on the evidence precisely

"...you ... ignore that mortgage of $80,000.00...almost totally."

In his argument D.22 concerning the $50,000 listing, Mr.Duplak urges this listing[s] puts a real and substantial value on the subject property. The listing[s] and action taken under those listings were described to the Board in Mr. Nolan's testimony. He showed to the Board's satifaction that:

1. They were blanket listings over several properties;
2. the listing agent was to convey all offers;
3. the listing contained no internal distribution of the listing value;
4. the listing gathered no action which might give any indication of a positive market value of the subject property.

The listing and explanation of Mr. Nolan of action under the listing do not even disclose what value, if any, Mr. Nolan in his own mind set on the property.

As an abstract thought, Mr. Duplak's argument, D.26 ("It still has value to an abutter.") commends itself to the Board. Abutters would be the most likely purchasers of this lot. In this case the abstract thought, although correct, does not help the Director's case. The concrete fact proven by Mr. Nolan to the Board's satisfaction is that the Appellant's abutters do not want to buy the land. If they should change their mind sometime in the future, Mr. Nolan

cannot yet predict when that will be and the Board has no indication of any such change. For the purposes of this appeal there is no value to the abutters. Mr. Nolan has proven this.

The Board agrees to this extent with the rest of Ms Donovan's argument Don.14. The Board realizes the property has a value, now to the Appellant because it owns it, and to others in the remote future. The Board passes at this point in the decision over any discussion of the value to the Appellant. The value to others in the remote future (as it would apply to almost any vacant land in Halifax) is not close enough in time to reflect in a more than nominal present market value. The Appellant's sales effort described by Mr. Nolan showed the property had no market value to others. This demonstration tends to show there was no value other than nominal.

The Board agrees that if the right circumstances exist (see Ms Donovan's argument Don.15) "property out that way does have value." From her point of view, the trouble is that the Board believes the right circumstances do not all yet exist to put value to the property.

The determining defect of the property is its landlocked condition; landlocked in the limited sense that it does not have access to a public road and, in an even more limited sense, that it does not have frontage on a public road

sufficent to support resdential development of the subject lands.

This may be a convenient place to deal with all arguments directly bearing on access.

Mr. Duplak argued:

D.27 "It also has value as development land because there is access available."

D.29 "... never made an application under The Private Ways Act. That's available."

D.30 "...tendering process for the City of Halifax."

Ms Donovan argued:

Don.45 "...the... property has a value but because of its present landlocked status the value is low not nominal."

Don.46 "...Nolan did not seriously pursue access."

Don.47 "Access is available. The Private Ways Act provides a statutory means of access." There is a City tendering process available as well.

Mr. Nolan's evidence showing his opinions contra will not be reproduced here.

The Board believes the evidence shows the abutters on three sides of the subject property will not provide access and they need no planning relief from any body which will force them to grant access or road frontage. On the fourth side of the subject property, the abutter also refuses access. If that land remains in private hands, and if the planning requirements of the City remain at least as

stringent as they are now, the owner of that land, when he wishes to develop his land through a subdivision process will likely have to provide access and road connection frontage to the subject land. The Appellant's problem is that that adjacent land is nowhere near development as a subdivision so relief from this quarter is probably remote and therefore very problematical at the present. Essentially no access will likely accrue automatically to the subject land through the operation of development controls over the abutting land.

Mr. Duplak promoted in his argument D.29 (and impliedly in his argument D.27) the **Private Ways Act** R.S.N.S., 1967, C.237 as a source of access to these lands. Ms Donovan in her argument Don.47 urged this same point. Both counsel accused Mr. Nolan of not following up on the Appellant's rights under this statute.

The Board is not sure whether the Appellant has any rights under this statute at all. It notes:

1. Sections 1 -14 of this statute seem to give this statute a decidedly rural rather than urban application

2. Part II of the staute section 15 (c) defines "council" means council for the municpality and (f) talks of the "warden" means the warden of the municipality.[Halifax has a Mayor and not a Warden]

3. The **Municipal Act**, R.S.N.S 1967, C.192 defines, at least for its purposes, a municpality in its sections 1 (h) and 2. It does not include the City of Halifax within the definition of "municipality" contained in this statute.
The Board, of course, is aware of other statutes that do define the City of Halifax as a "municipality". They do so

with great specificity. For example the **Municipal Board Act** which grants the Board what jurisdiction it has in its section 2(f) " 'municipality' means a city, incorporated town, or municipality of a county or district." The **Municipal Boundaries and Representation Act** R.S.N.S. 1967, C.196 S.1(d) reads: " 'municipality' means municipality to which the Municipal Act applies, city or town." The care with which these statutes include "city" in their definition of "municipality" is some indication that the word "municipality" in **Private Ways Act** does not include the City of Halifax.

The application of this act to the City of Halifax is very doubtful in the mind of the Board for those reasons alone. Since this statute was not directly argued from this point of view (although both Mr. Duplak and Ms Donovan argued generally that it applied to this land in the City) and since the Board has not throughly canvassed the law on this point and such canvassing is not essential to the Board's determination on this point, it will not rule whether or not the Appellant could have sought relief from the "municipality" of the City of Halifax under the **Private Ways Act.**

Sections 16(2), 17, 18 of the **Private Ways Act** envision some sort of expropriation process conducted by a commissioner appointed and answering to Council.

The Board does not know whether the statute envisaged process of settling land boundaries is a provincial statute unconstitutional because of Section 96 of the **Constitution Act.** The Board raises this question as perhaps being of merit. It was not argued, is not necessary for the Board's

disposal of this type of stautory relief for the Appellant's lack of access to the subject land, and, again the Board will not try to decide it.

Assuming that the Appellant (and ignoring for the time the cost of same) could unilaterally enforce access from a public road to the subject land (which the Board doubts for one or more of the reasons in above), it would only be able under Section 17 (2) of the **Private Ways Act** to provide a right-of-way which might not be made a public road and, even if it were, would not exceed 25' in width. Such access is insufficent under existing planning regulations to allow rational development of the subject property with residential construction.

Mr. Nolan may not have known of the **Private Ways Act** at least until the evidentary hearing in this appeal. Whether he did or not is immaterial, since it is unlikely the staute has any application to the City of Halifax. Even if it does, there is not certainty that the "municipality" will grant access. Even if it does, the maximum access the "municipality" can grant offers the Appellant no adequate solution of its access problem.

In such circumstances, the Board doubts the Appellant could have pursued any sensible relief under this statute. In such circumstances, Mr. Nolan should not be faulted for

not pursuing his company's rights, if any, under the **Private Ways Act.**

Both counsel have faulted Mr. Nolan for not pursuing a relief that Council might have sold him access over land adjacent to his in which the City holds some interest. Mr. Nolan did not detail in his evidence what relief, if any, was possible from the City. The maps and aerial photographs did not show easily accessible building-free parts on the City interest lands which leapt out and caught the attention of the Board. [That is not to say that a planner or surveyor could not have designated some proper road connection with the proper study]. Physical usable access over City interest lands does not readily appear to a casual observer like the Board on the evidence before it.

The City didn't even attend at the Board's evidentiary hearing to try to prove it would likely be able to provide the access which witnesses of both sides said was necessary for present residential development.

The Director did not call any such evidence at the Board evidentiary hearing. Such evidence, one would have thought, was germane to value. The Director clearly knew about such lack since his witness allowed for lack of access in his valuation. Mr. Nolan's position was no secret before the Board on the matter of access. The Board's evidentiary hearing was the second evidentiary hearing in this appeal

chain, the first being before the Regional Assessment Appeal Court. The Board would feel it unlikely that Mr. Nolan did not raise this lack of access even at that level of his appeal, if not before. The City was an interested purchaser/expropriator/partner in the adjacent City interest land. It would have been unlikely for an informed person in the position of the City not to be aware of the severed nature of the Appellant's land at least as of the time of the expropriation/purchase.

The land was isolated contrary to good planning principles that have been enforced by municipal planning authorities in the supervision of metropolitan private developers since at least the mid'60's.

The issue of access should not have been (and probably was not) any surprise either to the City or to the Director by the time of the Board's evidentiary hearing. The knowledge of City/government/partnership's policies on the disposal of land they own must be known to the City and be easily discernable by the Director. Yet neither chose to expose in evidence the policies governing the availability of suitable access over adjacent governmental type land for the subject land.

Although such knowledge was peculiar or easily accessible both to the Director as well as the City, no one tried to prove those policies, if in existence and if applied, would probably relieve the Appellant's problems of

access to its lands. The Board is entitled to assume in the evidentiary circumstances outlined above that there were no governmental policies on land disposal which would likely meet the Appellant's requirements for usable economical access to its land in question:the Board does so find.

The Board does not feel therefore there is much merit in Ms Donovan's Argument, Don.46. There is no sense in pursuing access that probably will not or cannot be granted on economic, suitable conditions.

Counsel discussed the interpretation of Sun Life$_3$ and its application to the facts of this case. The case has been previously been discussed above to some extent.

Mr. Duplak's arguments on Sun Life$_3$ read as follows:

D.23 "The Sun Life case, Justice Taschereau made it quite clear that the value to the owner only applies in expropriation cases. Same as highest and best use. It's a subjective test that is applied in expropriation cases to determine the compensation of the value of the land to the owner. They made it quite clear that in assessment cases, you have to use to use an objective test."

D.32 "The Supreme Court of Canada has said Mr. Nolan, Park Projects, is deemed to be an interested purchaser."

D.34 "And I think you had better read it [Bowater] in light of the decisions of Sun Life and you can't restrict your reading, Mr. Chairman, and I am not suggesting you do, but most people seem to read the first decision of Sun Life which is that of Mr. Justice Rand and accept that as the majority decision and it's not. There are five judges who write a decision. They all come to the same conclusion for all different reasons. Not one of them arrives at the same conclusion with the same reason."

D.35 "...if you followed that case through to the House of Lords ... and read their decision. ...

D.36 "I say their [Supreme Court of Canada] decision is confusing."

D.54 "...Sun Life...was dealing with...Charter...which determined that assessment must be based on the actual cash value of a moveable property as opposed to Section 38...which deals with market value."

Ms Donovan in argument further dealt with Sun Life$_3$ as well.

Don.8 "... some of the cases that were coming down from the courts on the surface in speaking of Sun Life appeared to give it a meaning that was not correct. "

Don.9 "...Sun Life says you take an objective approach to value. You don't look at speculative projections as to what you might do at some point in the future. ... speculative not potential. There is a difference between looking at speculative elements of value which you do take into account in an expropriation case."

Don.25 "...Judge O Hearn ... in the Scotia Square case ... says ... the true intent of these cases seems to have been to distinguish between elements that a prudent investor would take into account in making a bid for the property and purely speculative elements. In other words, the distinction that Sun Life made between the objective approach and the subjective approach.

Don.40 "...Wood Estate case and decision in Sun Life from which support for this statement is taken, clearly indicates that it is only speculative elements as elements of value that are excluded."

Don.41 "... all of the cases cited are applicable in determining the meaning of subsection 38(1)."

Mr. Nolan did not specifically comment on Sun Life$_3$.

The Board in reading Mr. Duplak's argument D.23 can find little problem with extracting the principle he is arguing

there that one cannot apply the expropriation test of the value of "highest and best use", appropriate for expropriation purposes, in valuation of land in Nova Scotia for assessment purposes. Bowater$_1$, an authority of necessarily highly persuasive value to this Board extracts this principle from Sun Life$_3$. Park Projects $_2$, a decision absolutely binding on this Board especially in this reordered decision cites and appears to endorse Bowater$_1$. In this appeal, at this level, this point cannot be in doubt.

Mr. Duplak's argument D.32 is correct. Mr. Nolan (or the Appellant, rather) is deemed to be a purchaser of the subject land. On the evidence before the Board, it is the only willing purchaser.

In his D.34 and D.36 arguments Mr. Duplak is requesting the Board to read the entire decision in Sun Life$_3$. The Board has done so. Mr. Duplak has invited the Board to read the individual decisions concurring in result, and perhaps draw principles (not specifically spelled out) from that decision which would allow the Board to differ from the principles contained in the decision of Bowater$_1$. The Board from its rereading of the decision is unable to draw any imperative to do so. The Board would have to find a very clear imperative indeed before it would try to differ from an authoritative Appeal Division decision and make a different selection from the catalogue of decisions as are available, says Mr. Duplak, in Sun Life$_3$

The Board would think it might have to, on occasion, select between two conflicting Appeal Division decisions and then hope for the best. That does not seem to be the situation here.

Without setting out the decisions in full of their Lordships in the Supreme Court of Canada, the Board is extremely loath to accommodate Mr. Duplak's invitation to judge which of those illustrious persons is correct. Are they all? The Board thinks such a selection, if meet, had rather be done by a conventional appeal court in the circumstances such as exist here and are explained above.

Mr. Duplak in his argument D.35 asked the Board, without giving a specific citation, to consider the decisions rendered in Sun Life$_3$ in the House of Lords. The Board doubts Sun Life$_3$ ever was or could have been considered on appeal in the House of Lords. If he meant the Judicial Committee of the Privy Council, he gave the Board no citation for that appeal either. In the Privy Council, the Board believes, there would have been only one decision and therefore the Board could not have selected amongst a catalogue of judges' decisions concurring in result only.

In his 1979 decision in Bowater$_1$, Cooper J.A. made no reference to any Privy Council decision on appeal from Sun Life$_3$. If there was in 1979 such a Privy Council decision, Cooper J.A. seemingly preferred that decision he cited from the Supreme Court of Canada decision. In 1989, in the

absence of the text from this Privy Council decision, the Board can only do likewise.

In his argument D.24, Mr. Duplak asked the Board to deemphasize the effect of Sun Life$_3$ on this case because the facts of the two cases are so different. Sun Life$_3$, said Mr. Duplak, was dealing with the assessment valuation of moveables under a Montreal City Charter whereas here we a dealing with the valuation Halifax real property under the Assessment Act of Nova Scotia. This is true.

It talks furthermore about "actual cash value" and our statute talks about "market value." In the view of the Board the contrast of these two phrases are germane to this appeal. Without reviewing the contrast, the Board says it has no cause to distinguish Sun Life$_3$ from the present case on its facts, and then say that Sun Life$_3$'s principles have no bearing on the present appeal. Sun Life$_3$ was good enough for Cooper J.A. in Bowater$_1$. Bowater$_1$ aided Clarke, C.J.N.S. in deciding Park Projects$_2$. The Board in these circumstances is hesitant to distinguish Sun Life$_3$ on its facts.

For the purposes of the discussion of assessment issues in this appeal there is no useful distinction between "actual cash value" and "market value."

Sun Life$_3$ in its headnote at p785 says:

"Actual value means real, or market, value....Where there is no actual market for the building, the assessor must endeavour to arrive objectively at a supposed exchange or

competitive market value. In this determination each property must be considered on its individual merits, an unlimited number of elements may arrise for consideration, and no fast rule can be laid down to cover all cases."

Tashereau J. at p802 of the same decision says:

"It is admitted that the words "real value" and "actual value" are interchangeable....
[p803]...'real value' ... settled law ... mean[s] what the building will command in,terms of money on the open market. ...Les mots valeur re elle signifient valeur actuelle, valeur marchande.

This extract alone, even ignoring the citation from O Hearn J.C.C. later on in this decision, seems to the Board to answer, in the refusal mode, Mr. Duplak's invitation to distinguish Sun Life$_3$.

Ms Donovan's argument Don.8 asks the Board to ignore certain decisions which she feels misinterpreted Sun Life$_3$. This is a safer approach for counsel when asking a Board, very low in the appeal pecking order, to interpret or to disregard decisions of courts outranking it in the appeal chain. This argument inveighs the correct interpretion of Sun Life$_3$, decided by the most superior of the courts, against erroneous decisions of less lofty courts. In such a context even a lowly Board may screw up its courage and try and find the alleged misinterpretations so that it may from its lowly vantage point to the correct law laid down by the Supreme Court.

The Board feels her argument Don.9 makes a valid distinction between speculative values (which have no

bearing in assessment cases but might have in expropriation cases) and future values that would, objectively, enter into the present market value of a prudent purchaser. The Board will follow her theme further when it considers her arguments based on the decision of O Hearn, JCC, in Halifax Developments Limited v. Director of Assessment(1983) 55 N.S.R.(2d) 455$_4$.

She makes the same point explicitly in her argument Don.25. The Board will postpone discussion of that argument until it deals with Halifax Developments$_4$.

Mr. Duplak dealt with Judge O Hearn's decision in Halifax Developments$_4$ in the following argument

D.55 "...O Hearn in...the Scotia Square case...stated...

> '...The conclusion is that the Canadian and Nova Scotian cases, above cited, rule out purely speculative elements in assessing market value, but that any circumstances or potentiality that a prudent purchaser would likely to give some weight to is proper to be taken into account in fixing the market value of the property... .' "

Ms Donovan dealt with Halifax Developments$_4$ in the following arguments.

Don.10 " And as O Hearn said in the Scotia Square case 'In an assessment case you are going to look at what a prudent investor would be looking at in determining the value of a property.' In other words, you have to look at the market value. And if you don't look at potential, then you aren't looking at the market value because virtually every purchaser who buys a piece of property is looking at the potential of that piece of property."

and restating Don.25

Don.25 "...Judge O Hearn ... in the Scotia Square case ... says ... the true intent of these cases seems to have been to distinguish between elements that a prudent investor would take into account in making a bid for the property and purely speculative elements. In other words, the distinction that Sun Life made between the objective approach and the subjective approach."

Don.34. "...Judge O Hearn summed it up all quite nicely [even though of lesser rank than other judges mentioned] ... the rank may not have been there, certainly the analysis ability was there so [he] shouldn't be disregarded just because of the rank."

Don.35 In writing Scotia Square (around the advent of the Municipal Board on the assessment appeal scene), Judge O Hearn sensed that it would be his last opportunity to decide from the County Court level an important assessment appeal. He was skilled in assessment matters and he wished to leave adequate guidance to those that followed. Scotia Square's decision amply met that ambition.... was just a general comment of the state of the law at the time."

In these arguments dealing directly with the proper interpretation of cited legal precedents, Mr. Nolan did not participate.

As mentioned before, the Board follows and appreciates Judge O Hearn's approach in explaining many of these decisions and their proper application to present assessment problems, so it follows and appreciates Mr. Duplak's extract from that decision quoted immediately above. The Board does not necessarily see this extract as support for his argument D.55 as he would have the Board do.

The Board also, and for the same reasons, agrees with Ms Donovan in her arguments Don.10, Don.25 and Don.35. It also agrees that Judge O Hearn's ability to do legal analysis was

of first rate caliber and worthy of great respect regardless of his relatively inferior ranking in the assessment appeal pecking order (See her argument Don.34)

Mr. Duplak then gives numerous strong arguments why the Board should favour the evidence of value expressed by Mr. Caiger, the assessor, over the conflicting views of values given by Mr. Nolan in evidence and in his arguments.

D.24 "...you have the evidence of the assessor as to value. You can't just take the assessor's evidence of value and throw it out the window...If it's wrong then the Board is going to have to show how it's wrong."

D.41"...you've got expert evidence that these are comparables,..."

D.42 Mr. Duplak argued that the burden of weighing the evidence between two conflicting bodies of evidence rested on the Board "on proper principles of law" and not on the Appeal Division. On this point he argued that the evidence of value for the Director was superior in these respects:
1. His valuator was an expert and qualified as such: Mr. Nolan was not so qualified;
2. Mr. Nolan was likely biased in that he had a direct financial interest in the outcome of the appeal: Mr. Caiger had no such financial interest which would lead him to be biased.
3. Mr. Caiger was merely performing a statutory duty."...He is required to arrive at market value."

On which evidence of value to prefer Ms. Donovan argued thusly:

Don.26 "...the better quality evidence here is where the assesor has gone around and done the best he could do to find comparables, apply a discount ... which is not challenged."

(Her argument Don.27 has already been exposed in this decision.)

Don.29 "... you're down looking at what evidence between the range of 0 and $5,000.00...where we should be looking.

Don.30 "... how good is that evidence [from Nolan as to 0 value] ... [when he] paid the taxes...paid the penalties...he didn't let it go... ."

Don.31 "[as opposed to] somebody who has been accepted as an expert, who has provided their opinion as to value under very difficult circumstances."

Don.32 "... the final comment...in analyzing the quality of the evidence as to value...whether its 0 or whether its 3,600, the City feels that the evidence is certainly much superior quality in coming up with the 3,600."

As might be expected, Mr. Nolan did not maintain his silence amidst these arguments on relative credibility.

N.13 "I think there's been some suggestion with respect to qualifications of the appraiser versus the qualifications of the owner of the land. I believe, and subject to checking the record, that you will find that Park did indicate that they were very knowledgeable, experienced in land values in this specific area. Ah had been involved in early development back as early as 1962. Knew this land intimately, perhaps more intimately then even the City knew it. Under those circumstances, is, I feel that their evidence should be given a fair amount of weight. It should not to be dismissed as not really knowing what they are talking about with respect to this specific piece of land."

N.14 "... the issue of bias... true I have a financial interest in the land ... but ... the appraiser by nature has an interest in defending his appraisal. ... he was not likely to come in here and admit his appraisal was wrong. His technique or his methodology or his numbers, for that matter.'

N.15 "... I believe they were stuck with what their own appraiser did. ... [a] He gave no weight or no consideration whatsoever to the potential of the land.
... [b] consideration should have been given to the fact that these lands at the time of appraisal were under consideration for rezoning. Everyone dismissed that....Having chosen to neglect that potential...he is stuck with his appraisal."

N.16 "Everyone may have a different opinion of what potential represents."

N.23 "[Caiger is wrong in that Nolan has correctly estimated the cost of access] at ten times what he [Caiger] estimated it to be."

Mr. Nolan made alternate arguments based on the hypothesis that his evidence on value was not credible.

N.21 "... they've argued...the evidence of Nolan should be disregarded ... Should not be really be given the weight. The appraiser is the report we should follow. and the land will come out somewhere between 0 and 3,600. If you accept the appraiser's methodology ..." he must:

a) use the comparable approach, compare it with these pieces of land and find the unadjusted market value and having found that make two adjustments to value namely;

b) adjust for location. This he did. Nolan takes no exception to this adjustment, then

c) adjust for lack of street frontage (access is not the issue, street frontage is)

d) the assessor made a 50% adjustment for lack of access. He should have deducted $29,000 (the cost of the Oakley property) to provide the street frontage needed for development.

If the assessor followed Mr. Nolan's procedure as suggested above he would have arrived at a negative value for the lands.

N.24 "So, basically, these are the arguments. The City can't have it both ways. If they want us to accept Mr. Caiger's appraisal, then they got to live by the results. Once you throw my evidence out, there's nothing left but Mr. Caiger's. The Board has to have something to go by. There is [sic] only two-two choices. Throw me out, or accept me that it has no value, or accept Mr. Caiger which would Mr. Caiger's figures, calculations using the proper values, the approach would indicate it as a negative value."

The Board recognizes the fact that Mr. Caiger has given expert evidence which the Board cannot "just throw out." (Duplak's argument D.24) Mr. Duplak was too polite to refer the Board again to the statment by Clarke C.J.N.S. in Park Projects[2]

"The evidence of Mr. Caiger was crucial to the determination to be made by the Board."

but that statement has been uppermost in the Board's attention throughout the argument. The Board agrees with Mr. Duplak's argument that the Board must be able to deal with Mr. Caiger's evidence to arrive at the result required by Section 38 of the Assessment Act. The Board does not now, and did not before intentionally, "take the assesor's evidence and throw it out the window."

Mr. Duplak seems to imply there is still some room for the Board to weigh Mr. Caiger's evidence.

In his argument D.41, Mr. Duplak says Mr. Caiger's admitted expertise means that his evidence of the comparables is determinative. With respect to both counsel and his expert witness, the Board has a duty to weigh this aspect of Mr. Caiger's report since it is, as pointed out by Mr. Nolan, the basis of all subsequent calculations in the report. All Mr.Caiger's comparables had usable economic road access. The Appellant's property did not.

Mr. Caiger himself freely stated he was not overly proud of his selections:

"P70.L4. A.The compulsory comparables have road frontage and as we know, the subject does not,..."

In arriving a discount rate for that lack of road frontage, Mr. Caiger used as a guide a discount rate applied to a 200 acre Suzy Lake property dealt with by the Board in Frederick Lordly v. Director of Assessment (1987) 6-A M.B.D. 126_5. The Board feels this was a poor guide (perhaps the best available to Mr.Caiger) for these two reasons:

1. The 200 acre size is too much different in size from that of the subject property. The effect of a lack of usable access and the cost of acquiring same is much more easily spread over a 200 acre block in the City than a 2.5 acre block in the City as a general rule. There should be more lineal feet of boundary to check for willing access grantors. There are just more finished building lots over which to spread the cost of developing the access.

2. A careful reading of Lordly$_5$ will disclose that Mr. Caiger was wrong to take that land as having no access. There were road allowances coming up to the boundaries of the property in that case. There was some access. In this case, as set out in so much detail elsewhere in this decision, there is no access at all. In the view of the Board, Mr. Caiger may have put too much emphasis on his understanding of the Lordly$_5$ decision when he arrived at the particular rate of discount to be applied in this case to the subject property.

Mr. Nolan made his counter argument to the use of any comparable in his argument N.18 when he argued "...where you

have a unique piece of land by definition you cannot find comparables. It is a contradiction in law. It is a contradiction in common sense." If Mr. Nolan were correct in this statement, then, of course, Mr. Caiger could not go further in his reasoned report since the basis of his valuation, the comparable, did not, in the evidence of this case, exist.

One piece of land on earth is comparable, in logic, with any other piece of land on earth regardless of their respective uses. They are both land, and they each bear at least a locational relationship one with the other. That does not mean they are comparables for assessment valuation purposes in the sense used by Mr. Caiger and other experts in the valuation of lands for assessment purposes.

In any use of a comparable for valuation for assessment purposes there is a built-in concept of remoteness. Some land, or its use, is so different from the comparison land, or its use, that the land may be too remote in likeness to constitute an appropriate comparable for valuation for assessment purposes. Although he didn't express it that way, Mr.Nolan raised the issue of remoteness against Mr. Caiger's comparables. The Board feels Mr. Nolan is right when he says the Appellant's land is so unique that the comparables selected by Mr. Caiger, although the best Mr. Caiger could find, are too remote to be compared to the Appellant's land as determinants of its value for assessment purposes.

Failing that, Mr. Caiger discount of 50% did not fully take into account Mr. Nolan's proof (which the Board has accepted and Mr. Caiger has rejected) that there was no market price to others for the land after exposure. That evidence should have caused Mr. Caiger to pause and reconsider his discount rate. He didn't do so as is clearly shown in the transcript:

"P74.L.15 Q. You were present and heard the evidence of the Appellant?

A. Yes.

Q. Was there anything in the witness for the Appellant's evidence that would indicate to you that your opinion of value is not correct?

A.No, there was not."

The Board does not find that Mr.Caiger selected the right comparables. It believes his evidence that he selected the best comparables that he could find. They were, in the opinion of the Board, too remote because of the access difference to serve as appropriate comparables.

Failing that, the Board does not feel the allowance of a 50% discount was a realistic allowance for usable road access when the evidence from Mr. Nolan access was:

1. Not available in one instance for less the several hundred thousand dollars;
2. Available for $29,000.00 for the land portion of the access at one relevant time in the past but no longer available. The $29,000.00 cost of acquiring the land on which to build the access could only be spread over the 2.5 acre lot to be developed.
3. Might be available in the next most logical place for access but only from the City/partnership owners and, as

the Board has noted above, was probably not available at all.

4. Not available at the only remaining available source for a time so remote as to be no access at all.

Mr. Duplak's (and to a lesser extent Ms Donovan's) arguments concerning bias are useful and accurate. They serve as check lists the Board must consider when weighing the evidence of a witness who has a direct financial interest in the outcome of litigation. There is no prohibition in such a witness telling the truth. The Board must, however, because of the admitted presumption of bias, listen carefully to such evidence and try to weigh it against any contradictory evidence, especially opinions.

The Board, with these thoughts in mind as much as the Board is capable, still had no hesitation in believing the essence of Mr. Nolan's testimony vis that he had made rational efforts to sell the subject property and had invited offers and had received none, even to refuse. In so doing, Mr. Nolan, with such a small piece of land located within the City, had demonstrated the actual market value of the property to be $0.00 or less, at least to everyone else but the Appellant.

In his argument D.44, Mr. Duplak argued that **Bowater**$_1$ was a less valuable precedent at this time because of the change in wording of the **Assessment Act** since the time of that decision.

D.44 "As mentioned previously, the section of the Assessment Act (Section 38) during the time of the Bowater case has changed from valuation of actual cash value offered at auction to its present wording of market value by a willing seller to a willing buyer."

Ms. Donovan did not argue Bowater$_1$ from this perspective. Mr. Nolan did not touch the topic.

The Board concedes that the legislature changed the wording of the relevant section of the Assessment Act after the facts which gave rise to Bowater$_1$'s decision. The Board notes the remarks of Taschereau J in Sun Life$_3$ at p802&ff:

"It is admitted that the words 'real value' and 'actual value' are interchangeable. ...'real value' and 'actual value' are regarded by the Legislature as convertible expressions.

...

[p803] Les mots valeur réelle signifient valeur actuelle, valeur marchande.

...

[p804]...'actual value' means value in exchange, that is what a prudent man of business taking into consideration the 'reversible currents which affect the value of the land' would likely pay for a property of the character under assessment.

...

The 'real value' is the 'market value' or the 'value in exchange.'

...

Estey J. had views on value for assessment purposes which seemed to equate 'actual value' with market value:

[p814] Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value..."

O Hearn, J.C.C. in Halifax Developments$_4$ (the Board is reading from the decision found in file C.H.34806) says at p5 "The Nova Scotia Court of Appeal in dealing with the meaning of 'actual cash value' has usually appeared to act on the assumption that it is equivalent to ..."market value'....

In this case, from the extracts from these cases, the Board does not agree that the change of legislation identified in Mr. Duplak's argument D.44 changes the effect of the decision in Bowater$_1$ as a precedent which helps in the determination of the issue in this appeal, namely what is the market value of the subject land.

Mr. Duplak has advocated that the comparative sales approach used by the assessor is the approach to be used for the valuation of the small piece of raw land assessed here.

D.45 "This method in simulating market value has been affirmed but the courts, resulting in a more meaningful tool to guide the assessor in estimating the market value through the notion of most likely selling price."

D.47 "...the only classification that is applicable to the valuation of raw, vacant land is the sales classification."

D.48 "The Comparative Sales Approach is the most direct of all valuation techniques. It is based on the comparison of sale prices of similar properties in a homogeneous neighbourhood, within a reasonable time span."

Ms.Donovan approaches the same problem from a slightly different tack in her argument Don.38.

Don.38 "The position of...Halifax...not precisely identical to that of the Province...is that the law in determining

assessment at market value is that the cost approach, income approach and market data approach must all be used in a proper examination of the question. There are cases which indicate...all three approaches should be used...because all provide insight into the value of the property. ... others such as the present case only the market sales approach should be used... ."

Mr. Nolan is not silent on the issue of the approach to be used in valuation of the Appellant's land.

N.18"I still feel there was a better way to appraise that land. I don't think that the comparable sales approach is the proper approach to be used with a unique piece of land. ...where you have a unique piece of land by definition you cannot find comparables. It is a contradiction in law. It is a contradiction in common sense."

N.19 "... there is no rule or system that says you must use the comparable sales approach."

N.20 "They use other yardsticks for measuring the cost of land in the real world."

The Board agrees with Mr. Duplak's argument D.45. The case law supports this argument. The argument does not dispose of the appeal issues in the manner Mr. Duplak advocates. This argument merely establishes that the technique used by the assessor in arriving at a value for the subject property is an appropriate assessment valuation technique. It does not handle the problem when the value set by this technique is contradicted by evidence of the actual market of the property to everyone but the Appellant, in this case, $0.00. This was set by the sales effort of the Appellant.

On a balance of probabilities, to the satisfaction of the Board, the Appellant has proven it made all reasonable

efforts to sell this property at any value and had no takers. On the facts of this case, this established that the market value of the property to others was $0.00.

Mr. Nolan then testified that the value to the owner was, in his estimate, $1.00. He was in a position to know the value to the owner as he was, in effect if not in law, the owner. No one cross-examined him sucessfully on this point. He was contradicted in result by the opinion of Mr. Caiger. They were not really in contradiction since one (Nolan) was proceeding from actuality and one (Caiger) was thinking in the abstract or imaginary mode. Mr. Caiger did not address the question of value to the actual owner. The Board says value to the owner is germane once the uniqueness of the property is established as one of the indicia of value. See Sun Life$_3$ at p801 and ff:(Taschereau, J.)

" This building has been rightly described as monumental and unique...one on which it is not easy to place a municipal valuation, and give to it a 'real' or 'actual' value.

In Sun Life$_3$ the aspect of that decision interesting in this appeal is the uniqueness of certain luxurious materials and designs used in the construction of the building on the land. The land was valued without dispute. Certain rentals were calculated and discounted because of the luxurious and therefore uneconomic construction. The owner was in active use of a major portion of the building. It had a psychological as opposed to directly economical motive in using the luxurious factor of the building construction. The

Court would not allow the added assessment attributable to the unique factor in this luxuriously constructed building. It said that value to the owner (there was no other market at the range of value suggested by the assessor), compensible to the owner in the case of an expropriation, was not assessable to the owner in municipal assessment.

In the present case, there is no market other than to the owner. There is no active use by the owner by a building on the property for its own use. The uniqueness of the the property comes not from the vacancy of the land but from the small size of the land and its landlocked condition. There is no element of luxury in the subject land. Yet it is unique. Its uniqueness prevents it having a market value of any but a nominal amount.

As Taschereau said at p803 of Sun Life$_3$:

" 'The fact that the municipality appraises the land each year as it then is, and in that way gets the benefit, from time to time, of each realized possibilty as it occurrs, must be considered. The reason for the rule in compensation cases that 'all advantages which the land possesses, present or future,' must be paid for, is that the land is finally taken, and the owner loses both those present and future advantages and the taker gets them.'

It naturally follows that a building may for municipal purposes, be valued at a much lower amount than the amount of compensation its owner would be entitled to if expropriated. In the latter case, the 'value to the owner' would be considered, but ignored in the former."

In argument the owner argued for a negative value for the land. In evidence he was of the opinion that the value was nominal. The Board has accepted his nominal valuation in

preference to the crucial opinion of Mr. Caiger, since Mr. Caiger in arriving at a small but substantial value for the land ignored the proof by Mr. Nolan that there was no value to the land at the present to ought but the owner. Kerwin J. at p795 of Sun Life[3]

"Where it is demonstrated, as is the case here, that by attempting to use the formula of the memorandum the result arrived at is not such value, then the formula must be disregarded."

Argument D.47 is not an accurate statement of any legal principle known to the Board. It may be the standard classification, but the present case is a clear example when a sufficent sales attempt did not arrive at a positive sale price, and where, because of the landlocked nature of the property and of its limited size there were no suitable comparables, and no accurate guidance to allow the assessor to select the appropriate discount for the state of the property to arrive at the correct result. The Assessor did not properly discount for the fact that the Appellant had made all reasonable efforts to sell and had not received any offers. He did not accept the unique nature of this property.

Argument D.48 is another argument which the Board can, with one exception, agree. It is obvious that the most direct of all valuation techniques is the freely negotiated sale of the subject property on the valuation date. In this case the Appellant has proven that there is no sale price on

valuation date. Any estimate which arrives at a substantially higher value must therefore be wrong. The technique proposed in Argument D.48 does not easily apply because it requires sale prices of "similar" properties in a "homgeneous" neighbourhood, within a reasonable time span.

In this case the time span used by Mr. Caiger is reasonable. The properties used as comparables are not very similar for the reasons stated elsewhere in this decision. They are not in a homogeneous neigbourhood with the subject property since because of its uniqueness it is not in a neighbourhood of any meaning for valuation purposes. To the extent that Mr. Caiger's valuation has not been able to be tested by the market, it was a creditable attempt to arrive at a valuation of a difficult property to value. His value was tested in the actual market. It failed that test.

On this same theme, Ms. Donovan's argument Don.38 is persuasive to the Board. The Board holds the opinion that it correctly states the positions of O Hearn J.C.C. in his masterful analysis of the cases to that date in Halifax Developments[4]. At p14 of the text being used by the Board, he writes as to the different approaches to valuation:

" ...it is pretty clear from Sun Life that there is a preferred sequence of approaches to use in estimating property values. This may not be a rule of law in the strict sense, but for all practical purposes it seems to have the force of law."

The Board does not find support for Ms. Donovan's position "...the present case only the market sales approach should be used" unless one includes in the market sales approach the efforts of the Appellant which proved the market.

The validity in logic of Mr. Nolan's arguments N.18, N.19 and N.20 are implicitly recognized by the quotation from Judge O Hearn set out two paragraphs above. Unfortunately, the same quotation recognizes the weight of authority that makes these logical (and to a businessman true) arguments incorrect.

In his argument D.50, Mr. Duplak argued that the Respondent [actually the Appellant here] did not advocate some new method of calculation for assessment valuation. Mr. Duplak won this argument in Park Projects. It is therefore moot here.

Mr. Nolan's arguments have been already stated on this moot point. Ms Donovan did not pursue it before the Board.

Another of Mr. Duplak's arguments is D.51

D.51 "One of the comparables used by Mr. Caiger in his Direct Sales Comparison Approach involved lands that were landlocked."

This representation is factually incorrect.

Mr. Duplak argued the following:

D.56 "... the proper valuation to be used is the value in use of the land."

Ms Donovan in argument Don.42 had this to say:

Don.42 "The City does not agree with the Director...value in use is the basis upon which property is to be valued for assessment purposes. Value in use and market value are not the same thing. The cases have repeatedly held that the market value is the value in exchange."

The Board feels that the position of Ms Donovan is correct. Judge O Hearn in Halifax Developments, at p9 writes:

"Indeed, His Lordship finally settled on 'exchangeable value' as the core of all different expressions used in the United States, Canada and., indeed, one case from Scotland, ... This was taken to mean 'the price which the subject will bring when exposed to the test of competition.'
Since all the elements of 'actual cash value' have thus been held to be contained, at least implicitly, in 'actual value', 'real value', 'market value' and 'exchangeable value', the expressions can be and have consistently been applied as equivalent....exchangeable value or value in exchange was the same as market value... ."

In his argument D.57 taken from his written submission to the Appeal Division (D.9 "... anything I was going to say has already been said in my factum to the Appeal Court. ") Mr. Duplak appears to criticize the Board's previous findings as to value.

D.57 "...the Board has taken the position that the potential of the land must be ignored and that the land must be valued on the basis of present value in present circumstances to present owner without consideration of other surrounding circumstances in the market."

D.61 "...the current assessed owner...must be deemed to be a potential willing buyer."

Ms Donovan approached the same issue in the following arguments:

Don.36 "...you do not confine yourself simply to present use. ...market must include...potential."

Don.37 "Only where the realization of a property's suggested potential is so speculative as to be something not normally considered by a reasonable purchaser, is that potential not included for assessment purposes."

Don.39 "The statutory requirement is to determine market value. Market value includes potential as perceived by the purchaser."

Don.43 "... Park Projects...supports the view that value for assessment purposes should be based on any reasonably immediate potential the property might have."

Don.11 "And if you don't take into [account] potential... because that is what every prudent investor takes into account, then you don't have market... you haven't done what is required by the Assessment Act."

Don.12 "...in this particular case...to find the market value of this particular property...you have to ignore speculative aspects of value...you have to try to determine what is the market value of that property today. That doesn't mean that you look at the present use and confine yourself just to that. You can look at the present use, but you are able also to go beyond that."

If the Board did as Mr. Duplak alleged in his argument D.57, then it would be in very good company. In Bowater[1] Cooper, J.A. wrote :

"[194] " In considering this issue of...enhancement...I think it is important to keep in mind that the land here is not being expropriated but merely assessed for purposes of municipal taxation-a yearly process. ...
I cannot finds any prospect of change throughout the period of assessment.
[p195]...There may be a recreational potential here but the realization of that purpose must be far in the future."

In Sun Life[3] Rinfret, C.J.C. said:

"[p788]...the municipal valuation is generally speaking, only made for one year... . In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. [p789]...there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.

Taschereau J.'s comments at the top of p803 have already been quoted in this decision.

Rand J. says:

"[p811]...and the crux of the problem would be in estimating the present value of those possibilities.
...Although the rule in expropriation would take their peculiar value to the owner into account as the assessor has done, that rule has no place in assessment...For the purposes here, those values must be subjected to the competitive test.

If these judges were wrong, or if the Board misapplied their findings to the consideration of this appeal, Ms Donovan's arguments Don.11, Don.12, Don.36, Don.37 and Don.39 seem to follow a safe course for discussing this point. These arguments seem to be founded on O Hearn, JCC's decision in Halifax Developments[4] starting at p5:

"In seeking to fix the meaning of 'actual cash value'[in our present context 'market value']...one should remember that there has been a process of development throughout the century not only in case law but in legislation. The Nova Scotia Court of Appeal has not expanded on the meaning of 'actual cash value'... .
[p6] A number of Nova Scotia cases since have proceeded on the basis that the principles set out by the Supreme Court of Canada and Privy Council in Sun Life are applicable in Nova Scotia: ...

[p8] The Ontario provision was subsequently changed to 'actual value' and [then]...to 'market value'. We adopted the latest... provision...market value... .
[p10] the ultimate aim is to find the exchange value of the property, i.e. the price at which the property is salable. ...

At p11 of his decision, already quoted in this decision, Judge O Hearn makes his definitive reconciliation of these cases in which he incorporates the "prudent investor" concept into a determination of market value for assessment purposes while ruling out any effect of purely speculative influences on such market value. At p13 [also previously quoted] he states this as a principle to be followed in assessment matters. On the same page Judge O Hearn recognizes the owner as a possible purchaser and he distinguishes the objective value to the owner rather the subjective value to the owner.

The Board holds the opinion that if Judge O Hearn's decision in Halifax Developments[4] correctly interprets the cases it purports to interpret, then this decision fits easily within its parameters. The Appellant has proven a $0 value to others. Its objective value to the owner, uncontradicted in the context before explained, was stated at $1.00. Its subjective value (fully accounting for any developmental dreams it might hold and exemplified by its prevention of tax sale, continued activity in this appeal chain, and its severance of the land in the first place) has

no place in the valuation for assessment purposes (qua Halifax Developments$_4$) of the subject land.

D.58 " '...strict interpretation lead to ludicrous situations...' where the burden of taxation would bear inequitably on tax payers similarly situate."

The Board may not have correctly understood this argument. To the Board's understanding it seems ludicrous to have this much litigation in an unique situation where the maximum tax differential in the taxation year in question is somewhere between $0.00 taxes and $30.00 taxes. The Board sees the uniqueness (which gives rise to the problem here) can be destroyed as a tax killer by either or both of the following, usable road access and/or a radical increase in acreage, say, to 25 acres or more.

When the road access becomes available then the property becomes marketable. As it becomes marketable the assessor may increase its value on the assessment roll to reflect the advent of the increased market value.

Mr. Duplak, in appealing the original decision here, in Park Projects$_2$, made the following argument:

D.59 "...the Board may have the necessary... expertise in dealing with assessment matters, its expertise does not extend to simply dismissing assessment practice and theory, and thus rule that a new practice and theory must be developed by the profession. The expert evidence...is...there are three methods of approach in valuation of property for assessment purposes. There is no fourth method known in the field...therefore...the Board

cannot ignore the expert testimony before it as to the method of valuation."

The Board can only conclude from the result in **Park Projects**$_2$ that the Appeal Division limited the infinite considerations that affect value of land. The Appeal Division decided, in effect at least, these infinite considerations be confined within the three approaches spelled out by Mr. Duplak in this argument.

Ms. Donovan approached this position of Mr. Duplak's from a slightly different angle.

Don.13 "...in this particular case we are faced with a fairly difficult situation...just because it is difficult doesn't mean there is no value."

Her argument does not affect the result alluded to by O Hearn J.C.C. cited previously in this decision:

"This may not be a rule of law in the strict sense, but for all practical purposes it seems to have the force of law."

The Board must, it feels, accept that valuations for assessment purposes be set within some combination of the methods of valuation outlined by Mr. Duplak's argument D.59.

The Board cannot "ignore" the expert evidence before it. It, hopefully, has the duty to weigh the "crucial evidence" of Mr. Caiger in arriving at the market value of the assessed property for assessment purposes.

Ms. Donovan argues that there is a positive value for this property. The Board has already conceded that her

argument Don.10 is correct. It also agrees with the general theme of her argument Don.48 which the Board takes to be a criticism of Mr. Nolan's arguments that the property had a negative value. As found by the Board, Mr. Nolan's evidence proved the Appellant could obtain no sale to others of the land. The conduct of Nolan and his evidence (which are essentially the conduct and evidence of the Appellant) showed that there was value to the Appellant in the sense that the Appellant must be considered to be one of the prospective purchasers of the land.

The question then becomes what evidence does the Board have that goes to the interest of the Appellant in the land as a potential purchaser. Mr. Nolan said $1.00.

In her arguments Don.21 and Don.22, Ms Donovan suggests the Board should adopt Mr. Caiger's evidence of valuation to determine the valuation for assessment purposes of the subject property. Those arguments are:

Don.20."...Caiger took the approach...'I've got a difficult task. I'm going to do the best I can. I'm going to take property that's as physically comparable as I can manage - and that certainly isn't coming up with an identical comparable to this. ...because I can't I'm going to apply any discounts.' "

Don.21 "[As to Caiger's selection of the appropriate discount rate]...the Board will [she meant "would"] have to try and wrestle with that problem if it had evidence to suggest another discount rate."

As it said before, the Board believes Mr. Caiger behaved essentially as set out in these two arguments. If there were no more direct indication of the market value of the subject property, the Board would have no hesitation in following this technique and agreeing with the value set.

In the Board's opinion, Mr. Nolan provided direct believable evidence of the actual market value to others. He provided the only evidence of the value to the Appellant as purchaser.

Mr. Caiger either didn't believe the clear evidence of Mr. Nolan or he failed to give it appropriate consideration when establishing his discount rate for lack of usable access coupled with lack of more size in the subject property. Where the two opinions differ (and they do differ at least to final valuation), the Board prefers that based on the direct market information of Mr. Nolan to the indirect market information of Mr. Caiger.

Ms Donovan argues in Don.7:

Don.7 "The City's interest in this matter is that it is extremely concerned that this concept of how you approach market value in expropriation cases versus assessment cases."

This argument obviously explains why the City only engaged in this appeal after the Board had filed its first and erroneous decision. It explains why the City

participated in the Board proceedings leading up to this decision. It requires no further comment from the Board.

Don.33 "...this highest and best use concept is really a most unsatisfactory concept."

This general position stated by the City is intellectually interesting. The concept has been mentioned in many of the cases cited above as not being applicable in the setting of values in assessment cases. If forced to decide the issue the Board would prefer to follow the rationalizations of O Hearn J.C.C. in Halifax Developments.

The Board sees no reason to determine the general point raised by this argument and therefore declines to do so.

Apparently the Board has not yet dealt, by number, with Mr. Duplak's argument D.60.

D.60 "... the..assessment technique of the hypothetical market with a hypothetical buyer and a hypothetical seller is a proper technique to be used."

This argument is correct as stated. As applied by Mr. Caiger in this appeal, this approach did not arrive at the market value of the subject property for assessment purposes. In the view of the Board his evidence was crucial to, but not determinative of, the appeal. The reasons for this conclusion of the Board have been set out in many variations above and will not be repeated here.

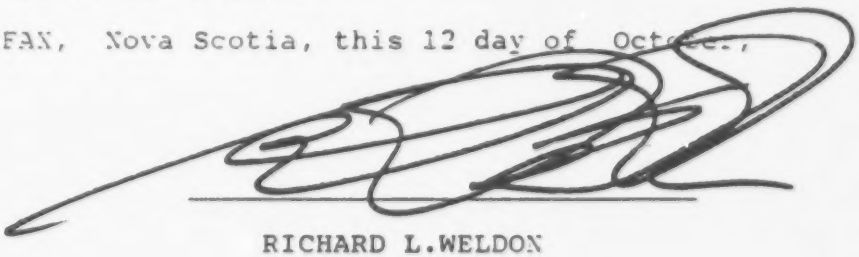
The Director will pay his own costs. The costs of the day have already been dealt with, the Board having set a lump

sum payable by the City to the Appellant. The City and the Appellant will each bear its own costs for all other aspects of the appeal.

The Board has determined the market value of the subject property as of the date set by the Director, namely January 1, 1986 at $1.00. To this value the Board applies the general level of assessment and arrives at a market value of $.96 which it rounds to $1.00. The Board thus finds the market value of the subject property for assessment purposes as of January 1, 1986 to be $1.00 for the taxation year 1987.

An order will issue accordingly.

DATED AT HALIFAX, Nova Scotia, this 12 day of October, A.D., 1989.



RICHARD L.WELDON

MEMBER

NOVA SCOTIA MUNICIPAL BOARD

SCHEDULE A

1 Bowater Mersey Paper Company Limited v. Digby County and Director of Assessment (1979) 33 N.S.R.(2d) 181

2 The Director of Assessment v. Park Projects Limited and the City of Halifax S.C.A. 01899 (unreported)

3 Sun Life Assurance Co. of Canada v. Montreal, [1950] 2 D.L.R. 785

4 Halifax Developments Limited v. Director of Assessment(1983) 55 N.S.R.(2d) 455 (Board used file copy of CH# 34806)

5 Frederick Lordly v. Director of Assessment (1987) 6-A M.B.D. 126

SCHEDULE B

THE BOARD'S EXTRACTS OF ARGUMENTS

MR. DUPLAK'S ARGUMENTS

ON THE ADJOURNMENT ARGUMENT

D.1 "I consent to the adjournment, Mr. Chairman."

D.2 "...it would still appear to be more than three years taxes outstanding, and we are only talking about one year here."

D.3 "The first is fine with me. The next three weeks are out for me in May."

D.4 [As to the $50.00 costs awarded the Appellant in the Board's first decision.] "That's quashed."

ON THE REST OF THE ARGUMENT

D.5 "I was successful in the appeal. I will take the initiative and start."

D.6 "... the purpose is simply to hear legal argument today. as to what should be the value of the property based on the evidence that has already been presented to the Board....And the matter was just sent back to the Board to reconsider the evidence under proper principles of law."

D.7 "I not only think that you erred in saying that he used the highest and best use. We also went to the Appeal Court over your comment that ... p23 of the decision, second paragraph last sentence: 'The Board further notes that another method other than market data approach to valuation of this particular piece of land, landlocked as it is, may have to be used by an assessor to arrive at more than a nominal market value.' And that was the reason...the main reason for our appeal was."

D.8 "...the market data approach was the only approach that could be used...the only three approaches to value, didn't know why you had to come up with a fourth one."

D.9 "... anything I was going to say has already been said in my factum to the Appeal Court. "

D.10 "...the Court says:

> ' The evidence of Mr. Caiger is crucial to the determination to be made by the board.
>
> ...
>
> whether what the assessor did by using direct sales comparisons and making certain adjustments answered the statutory requirements. Section 38."

So they don't say you have to take his evidence carte blanche. But that his evidence is crucial in the determination that the Board must make."

D.11 "The fact they said his evidence was crucial to this determination, I submit that it can't be dismissed as being

the highest and best use and therefore not relevant. I think that is a finding of fact [sic] by the Appeal Court and the Board is bound by it."

D.12 "...this decision finally puts to rest the Bowater decision... . lawyers so interpreted [it] that it went far beyond the parameters for which that decision stood for. The Bowater case simply stood for the proposition that highest and best use it's a method of valuing property for expropriation and not for assessment purposes. That highest and best use refers to speculative future possible uses of property."

D.13 "... the best indicator of value for the property is the sale of the property."

D.14 "[In Bowater] Mr. Justice Cooper does not use the word 'future'."

D.15 "... when you are talking about market you are talking about current market conditions that prevail in an area."

D.16 "For assessment. This is what I was using in the Appeal Court as my example. Current market conditions determined the value of that land and that that land was valuable as commercial land based on the current market conditions."

D.17 "...there were offers for that land."

D.18 "...[if] the land has got no value, then any offer has to be a serious offer."

D.19 "A telephone inquiry is an offer."

D.20 " It is clear that he had offers. ...His own word is there were offers. ... he said they were offers"

D.21 "...$80,000.00 mortgage...an indication of value to the owner, ..."

D.22 "... he listed it at $50,000.00."

D.23 "The Sun Life case, Justice Taschereau made it quite clear that the value to the owner only applies in expropriation cases. Same as highest and best use. It's a subjective test that is applied in expropriation cases to determine the compensation of the value of the land to the owner. They made it quite clear that in assessment cases, you have to use to use an objective test."

D.24 "...you have the evidence of the assessor as to value. You can't just take the assessor's evidence of value and throw it out the window...If it's wrong then the Board is going to have to show how it's wrong."

D.25 "... it has a value as investment purposes."

D.26 "It still has value to an abutter."

D.27 "It also has value as development land because there is access available."

D.28 "... go back and read the record."

D.29 "... never made an application under **The Private Ways Act**. That's available."

D.30 "...tendering process for the City of Halifax."

D.31 "... a prudent purchaser would pay a value for that property taking into account the value of the land, the cost of renovation..."

D.32 "The Supreme Court of Canada has said Mr. Nolan, Park Projects, is deemed to be an interested purchaser."

D.33 Mr. Duplak argued the Board could read **Bowater** and conclude that the suitable cottage property was so isolated that its presence did not enhance the value of the whole land.

D.34 "And I think you had better read it [**Bowater**] in light of the decisions of **Sun Life** and you can't restrict your reading, Mr. Chairman, and I am not suggesting you do, but most people seem to read the first decision of **Sun Life** which is that of Mr. Justice Rand and accept that as the majority decision and it's not. There are five judges who write a decision. They all come to the same conclusion for

all different reasons. Not one of them arrives at the same conclusion with the same reason."

D.35 "...if you followed that case through to the House of Lords ... and read their decision. ...

D.36 "I say their [Supreme Court of Canada] decision is confusing."

D.37 "... the Board...it's looking at valuation from a subjective point of view of Park Projects. "

D.38 "... if you are going to value this property based on looking on Mr. Nolan's evidence. His evidence still has to fall within one of the three approaches to value."

D.39 "... we don't know what it didn't sell for."

D.40 "...I don't think that you can take his words: 'I don't consider them serious offers.' and say offers isn't an offer of value."

D.41 "...you've got expert evidence that these are comparables,..."

D.42 Mr. Duplak argued that the burden of weighing the testmony between two conflicting bodies of testimony rested on the Board "on proper principles of law" and not on the Appeal Division. On this point he argued that the evidence of value for the Director was superior in these respects:

1. His valuator was an expert and qualified as such: Mr. Nolan was not so qualified;

2. Mr. Nolan was likely biased in that he had a direct financial interest in the outcome of the appeal: Mr. Caiger had no such financial interest which would lead him to be biased.

3. Mr. Caiger was merely performing a statutory duty."...He is required to arrive at market value."

D.43 "The Board is required to arrive at market value."

This seems to summarize Mr. Duplak's verbal arguments.

The arguments Mr. Duplak made in his facta to the Appeal Division which he commended to the Board's attention and which are not already outlined in D.1 to D.43, inclusive, follow in summary:

FROM MEMORANDUM ON APPLICATION FOR LEAVE TO APPEAL

D.44 "As mentioned previously, the section of the **Assessment Act** (Section 38) during the time of the **Bowater** case has changed from valuation of actual cash value offered at auction to its present wording of market value by a willing seller to a willing buyer."

D.45 "This method in simulating market value has been affirmed but the courts, resulting in a more meaningful tool to guide the assessor in estimating the market value through the notion of most likely selling price."

D.46 "... the sale of a property is a direct estimate of a value that the market places on the property."

D.47 "...the only classification that is applicable to the valuation of raw, vacant land is the sales classification."

D.48 "The Comparative Sales Approach is the most direct of all valuation techniques. It is based on the comparison of sale prices of similar properties in a homogeneous neighbourhood, within a reasonable time span."

D.49 "...it is entirely possible for a property to have a value in use to owner which is greater than its market value."

D.50 "The Respondent did not advocate...that some new method of valuation must be found but argued instead that the ...Board should use the Cost of Development Approach in valuing this `and."

D.51 "One of the comparables used by Mr. Caiger in his Direct Sales Comparison Approach involved lands that were landlocked."

D.52 "...Bowater...decision only stands for the following propositions: (1) that the highest and best use is not a proper method for valuing property for assessment purposes. (2) that consideration of the value of the land must not take into account speculative matters outside the assessment year."

D.53 "...Justice Jones dissented...

> 'He had to weigh the evidence, determine whether there was a market in the area for water frontage for recreational purposes...It is not the use the owner makes of the land to determine its value but the market.'

...Jones was correct in the statement of this principle and that this principle was not in conflict with the majority decision in...Bowater... ."

D.54 "...Sun Life...was dealing with...Charter...which determined that assessment must be based on the actual cash value of a moveable property as opposed to Section 38...which deals with market value."

D.55 "...O Hearn in...the Scotia Square case...stated...

> '...The conclusion is that the Canadian and Nova Scotian cases, above cited, rule out purely speculative elements in assessing market value, but that any

> circumstances or potentiality that a prudent purchaser would likely to give some weight to is proper to be taken into account in fixing the market value of the property... .' "

and, in so stating, argued Mr. Duplak, Judge O Hearn supported the argument made in D.54 **supra.**

D.56 "... the proper valuation to be used is the value in use of the land."

D.57 "...the Board has taken the position that the potential of the land must be ignored and that the land must be valued on the basis of present value in present circumstances to present owner without consideration of other surrounding circumstances in the market."

D.58 "...strict interpretation lead to ludicrous situations..." where the burden of taxation would bear inequitably on tax payers similarly situate.

D.59 "...the Board may have the necessary... expertise in dealing with assessment matters, its expertise does not extend to simply dismissing assessment practice and theory, and thus rule that a new practice and theory must be developed by the profession. The expert evidence...is...there are three methods of approach in valuation of property for assessment purposes. There is no fourth method known in the field...therefore...the Board cannot ignore the expert testimony before it as to the method of valuation."

D.60 "... the..assessment technique of the hypothetical market with a hypothetical buyer and a hypothetical seller is a proper technique to be used."

D.61 "...the current assessed owner...must be deemed to be a potential willing buyer.

In the above summary the Board believes it has caught the essence of all the arguments advanced by Mr. Duplak on behalf of the Director.

ARGUMENTS ON ADJOURNMENT BY MR. ALLEN FOR THE CITY

A.1 "...solicitor of record for the City...Donovan...tragedy in her family...she is not here and not able to be here today....we have not had time to assign the case to anybody else in our office for preparation we would request in the interests of presenting a fair case on behalf of our client... an adjournment...until we are able to prepare an adequate case, perhaps until Ms Donovan returns to work".

A.2 "...tax sale...unrelated matter."

A.3 "I don't have any instructions on the issue of the tax sale."

A.4 [After an adjournment to obtain instructions on the tax sale matter.] "...tax sale ...Monday... taxes for 1986,'87 and '88...appeal only relates to the 1987

assessment....Section 102 of the Assessment Act...specifically permits the collection of taxes to proceed"

A.5 [As to costs of the day thrown away]"... it becomes a question of what makes sense in a case like this...I don't see that because the monetary basis of the appeal may not be rational that the municipality in turn should be ... [penalized]."

A.6 "After Christmas someone will be available from the City."

This ends Mr. Allen's arguments on the adjournment motion and costs related thereto and his public participation in the conduct of the appeal.

MS DONOVAN'S ARGUMENTS

The Board first lists the arguments it extracted from her oral presentation . Of these, the arguments on costs thrown away appear in this first set.

Don.1 "The City wasn't here at the Municipal Board."

Don.2 "...we probably here would like to be in a position to present additional evidence but the Appeal Division didn't give the opportunity."

Don.3 "...the City's primary interest here is...the legal aspect of this and how this Board in this case and in future is going to deal with...including elements of potential in considering the market value of property."

Don.4 "...I guess my thought on this is that my mind is cluttered with the reality [as opposed to the evidence.]"

Don.5 "...if the Director is successful so is the City but the City is not looking for costs."

Don.6 "...on the matter of costs that have been sought by the Respondent[sic]...

[a] an extremely unfortunate situation...my landing in the hospital on ...4th of November... should be taken into account ... an unpredictable event. ...

[b] Mr. Nolan has been in the City since November...presumably for other reasons...

[c] ... the City was available at any other time...after I got out of hospital...I was available for work after about the second or third week of November...

[d] But when he set agreed to this May hearing ... he intended to be in the City anyway. I gather he is in the City regularly on...other business."

Then Ms Donovan made the following arguments bearing more on the issues of substance raised in this appeal.

Don.7 "The City's interest in this matter is that it is extremely concerned that this concept of how you approach market value in expropriation cases versus assessment cases."

Don.8 "... some of the cases that were coming down from the courts on the surface in speaking of Sun Life appeared to give it a meaning that was not correct. "

Don.9 "...Sun Life says you take an objective approach to value. You don't look at speculative projections as to what you might do at some point in the future. ... speculative not potential. There is a difference between looking at speculative elements of value which you do take into account in an expropriation case."

Don.10 " And as O Hearn said in the Scotia Square case 'In an assessment case you are going to look at what a prudent investor would be looking at in determining the value of a property.' In other words, you have to look at the market value. And if you don't look at potential, then you aren't looking at the market value because virtually every purchaser who buys a piece of property is looking at the potential of that piece of property."

Don.11 "And if you don't take into [account] potential... because that is what every prudent investor takes into

account, then you don't have market... you haven't done what is required by the **Assessment Act.**"

Don.12 "...in this particular case...to find the market value of this particular property...you have to ignore speculative aspects of value...you have to try to determine what is the market value of that property today. That doesn't mean that you look at the present use and confine yourself just to that. You can look at the present use, but you are able also to go beyond that."

Don.13 "...in this particular case we are faced with a fairly difficult situation...just because it is difficult doesn't mean there is no value."

Don.14 "...the impression that the City has is that the Board's gut reactions [two] to this whole situation originally was that a property in the location...has to have a value something more than nominal...[and] you ... ignore that mortgage of $80,000.00... almost totally."

Don.15 "...if the right circumstances exist, property out that way does have value."

Don.16 "...Nolan..., other than 0, didn't provide any numbers."

Don.17 "... he...tried to sell it to the City of Halifax, that's back in '72."

Don.18 "... he lumps the City in with C.M.H.C...that wasn't an offer to sell to the City."

Don.19 "...without that kind of hard evidence [specific dollar offers for the land and a willingness to entertain any dollar positive offer], there is nothing in what Mr. Nolan had to say."

Don.20."...Caiger took the approach...'I've got a difficult task. I'm going to do the best I can. I'm going to take property that's as physically comparable as I can manage - and that certainly isn't coming up with an identical comparable to this. ...because I can't I'm going to apply any discounts.' "

Don.21 "[As to Caiger's selection of the appropriate discount rate]...the Board will [she meant "would"] have to try and wrestle with that problem if it had evidence to suggest another discount rate."

Don.22 "...he did not indicate...that he was open to any offer whatever on this property."

Don.23 "We don't know what price was identified on the listing."

Don.24 "... as far as the **Bowater** case goes ... all that was being dealt with there the balancing of the evidence in that particular case."

Don.25 "...Judge O Hearn ... in the Scotia Square case ... says ... the true intent of these cases seems to have been to distinguish between elements that a prudent investor would take into account in making a bid for the property and purely speculative elements. In other words, the distinction that Sun Life made between the objective approach and the subjective approach.

Don.26 "...the better quality evidence here is where the assessor has gone around and done the best he could do to find comparables, apply a discount ... which is not challenged."

Don.27 "[as to Nolan's listing of several properties together]...he's not providing us the breakdown of what the split should be."

Don.28 "I think you can only look at the record as it is."

Don.29 "... you're down looking at what evidence between the range of 0 and $5,000.00...where we should be looking.

Don.30 "... how good is that evidence [from Nolan as to 0 value] ... [when he] paid the taxes...paid the penalties...he didn't let it go... ."

Don.31 "[as opposed to] somebody who has been accepted as an expert, who has provided their opinion as to value under very difficult circumstances."

Don.32 "... the final comment...in analyzing the quality of the evidence as to value...whether its 0 or whether its 3,600, the City feels that the evidence is certainly much superior quality in coming up with the 3,600."

Don.33 "...this highest and best use concept is really a most unsatisfactory concept."

Don.34. "...Judge O Hearn summed it up all quite nicely [even though of lesser rank than other judges mentioned] ... the rank may not have been there, certainly the analysis ability was there so [he] shouldn't be disregarded just because of the rank."

Don.35 In writing Scotia Square (around the advent of the Municipal Board on the assessment appeal scene), Judge O Hearn sensed that it would be his last opportunity to decide from the County Court level an important assessment appeal. He was skilled in assessment matters and he wished to leave adequate guidance to those that followed. Scotia Square's decision amply met that ambition.... was just a general comment of the state of the law at the time."

Don.36 "...you do not confine yourself simply to present use. ...market must include...potential."

The following arguments were gleaned from Ms Donovan's written presentations to the Appeal Division.

Don.37 "Only where the realization of a property's suggested potential is so speculative as to be something not normally considered by a reasonable purchaser, is that potential not included for assessment purposes."

Don.38 "The position of...Halifax...not precisely identical to that of the Province...is that the law in determining assessment at market value is that the cost approach, income approach and market data approach must all be used in a proper examination of the question. There are cases which indicate...all three approaches should be used...because all provide insight into the value of the property. ... others such as the present case only the market sales approach should be used... ."

Don.39 "The statutory requirement is to determine market value. Market value includes potential as perceived by the purchaser."

Don.40 "...**Wood Estate** case and decision in **Sun Life** from which support for this statement is taken, clearly indicates that it is only speculative elements as elements of value that are excluded."

Don.41 "... all of the cases cited are applicable in determining the meaning of subsection 38(1)."

Don.42 "The City does not agree with the Director...value in use is the basis upon which property is to be valued for assessment purposes. Value in use and market value are not the same thing. The cases have repeatedly held that the market value is the value in exchange."

Don.43 "... Park Projects...supports the view that value for assessment purposes should be based on any reasonably immediate potential the property might have."

Don.44 "...Bowater... did not create a special form of "market value" specific to the assessment process."

Don.45 "...the... property has a value but because of its present landlocked status the value is low not nominal."

Don.46 "...Nolan did not seriously pursue access."

Don.47 "Access is available. The Private Ways Act provides a statutory means of access." There is a City tendering process available as well.

Don.48 "Mr. Nolan's statement that the property is worth nothing is inconsistent with his other evidence and not believable."

As the Board understands them these were the additional or differing [from the Director's] arguments presented on the City's behalf by its solicitors.

MR. NOLAN'S ARGUMENTS

The Board starts with those arguments of his that deal with the adjournment and the costs consequent thereon.

N.1 "I didn't want to appear unreasonable."

N.2 "I may or may not be here. I spend more than 1/2 of my time out of the City now."

N.3 "... the City is in the process of selling this land for taxes sometimes this month. ... they could hold off the tax sale...they declined to do it. ...they are being a bit arbitrary in this whole thing, forcing the sale."

N.4 "Mr. Chairman, my difficulty is that I am leaving for the U.S. and probably, I don't know the date, I have no plans to return here specifically in any point in time. I can make the arrang... I am concerned about the expense. It is going to cost me, I am staying at Kennebunkport. It is going to cost me. By the time I get to Kennebunkport... I don't mind doing that. I got to pay $580.00 for air flight ticket and rent an hotel. I don't know. Is there any way I could recover these expenses if I am successful? If I have to do it I have to do it. I find this...

N.5 "...can I at least recover my out-of-pocket expenses that I can document? They are going to run several hundred dollars. The alternative is to hire a lawyer locally and it

is still goin' to run several hundred dollars. It is a Catch 22 situation for me.

N.6 "... once we are over next Monday, we might as well be over Christmas."

N.7 "How about May 1st?"

N.8 "Ah, so no one misunderstands I am not asking you to comment on this, if I have to come back here I will be presenting as part of this hearing my recoverable expenses which are out-of-pocket for taxis, hotel bill, and plane fare to come up on May 1st. Everybody can deal with it but I will be putting it forth before the Board. So there is no misunderstanding."

N.9 "... I was brought back here with considerable expense as it relates in respect to a postponement requested by the City. ... there are plenty lawyers on staff down there. From my point of view is to proceed with this hearing last November.

N.10 "I'd like to ask [for] at least..my out-of-pocket expenses for an airplane ticket...plus 1 night's accomodation for being forced to come back here for this hearing. ... it could have been disposed of last November."

N.11 "... as we all did agree to May 1st, that it would be necessary to come back...I would not be in the country for May 1st for any other reason than this hearing.

N.12 "They [probably the Director] could have raised the subject of their claiming costs at that point in time and they didn't. Now they have decided they want to sit there and are going to claim their costs. They didn't at the time raise the issue."

This appears to finish all parties arguments as to Costs and the adjournment. We will now proceed to list Mr. Nolan's arguments on behalf of the Appellant.

N.13 "I think there's been some suggestion with respect to qualifications of the appraiser versus the qualifications of the owner of the land. I believe, and subject to checking the record, that you will find that Park did indicate that they were very knowledgeable, experienced in land values in this specific area. Ah had been involved in early development back as early as 1962. Knew this land intimately, perhaps more intimately then even the City knew it. Under those circumstances, is, I feel that their evidence should be given a fair amount of weight. It should not to be dismissed as not really knowing what they are talking about with respect to this specific piece of land."

N.14 "... the issue of bias... true I have a financial interest in the land ... but ... the appraiser by nature has an interest in defending his appraisal. ... he was not likely to come in here and admit his appraisal was wrong. His technique or his methodology or his numbers, for that matter.'

N.15 "... I believe they were stuck with what their own appraiser did. ... [a] He gave no weight or no consideration whatsoever to the potential of the land.

... [b] consideration should have been given to the fact that these lands at the time of appraisal were under consideration for rezoning. Everyone dismissed that....Having chosen to neglect that potential...he is stuck with his appraisal."

N.16 "Everyone may have a different opinion of what potential represents."

N.17 "I think the real issue is the value of the land as of the date of the appraisal."

N.18 "I still feel there was a better way to appraise that land. I don't think that the comparable sales approach is the proper approach to be used with a unique piece of land. ...where you have a unique piece of land by definition you cannot find comparables. It is a contradiction in law. It is a contradiction in common sense."

N.19 "... there is no rule or system that says you must use the comparable sales approach."

N.20 "They use other yardsticks for measuring the cost of land in the real world."

N.21 "... they've argued...the evidence of Nolan should be disregarded ... Should not be really be given the weight. The appraiser is the report we should follow. And the land will come out somewhere between 0 and 3,600. If you accept the appraiser's methodology ..." he must:

a) use the comparable approach, compare it with these pieces of land and find the unadjusted market value and having found that make two adjustments to value namely;

b) adjust for location. This he did. Nolan takes no exception to this adjustment, then

c) adjust for lack of street frontage (access is not the issue, street frontage is)

d) the assessor made a 50% adjustment for lack of access. He should have deducted $29,000 (the cost of the Oakley property) to provide the street frontage needed for development."

If the assessor followed Mr. Nolan's procedure as suggested above he would have arrived at a negative value for the lands.

N.22 "[As to the value of the lands to the abutters] The evidence is that they didn't want it."

N.23 "[Caiger is wrong in that Nolan has correctly estimated the cost of access] at ten times what he [Caiger] estimated it to be."

N.24 "So, basically, these are the arguments. The City can't have it both ways. If they want us to accept Mr. Caiger's appraisal, then they got to live by the results. Once you throw my evidence out, there's nothing left but Mr. Caiger's. The Board has to have something to go by. There is [sic] only two two choices. Throw me out, or accept me that it has no value, or accept Mr. Caiger which would Mr. Caiger's figures, calculations using the proper values, the approach would indicate it as a negative value."

N.25 " And I also say that unless someone can show the Board some evidence that it must be carried on the Roll, it not be carried on the Assessment Roll. And that obligation and duty falls on the City, not on the owner of the land to produce that evidence."

N.26 "... there are situations where land has a negative value. Now, they are not common, but they exist."

N.27 "This was a very troubled piece of land... . I think it really supports my case that the land at the date of

assessment really did not have a market value...we tested the market and the market didn't respond."

Mr. Nolan's arguments are now summarized as best the Board can.

CAN-EURO INVESTMENTS LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - COST APPROACH v. INCOME APPROACH - 118 UNIT BUILDING - UNIFORMITY - ASSESSMENT ACT, S. 38, 84(1).

C-E.I. Ltd. appealed a decision of the Dartmouth Regional Assessment Appeal Court which reduced the 1988 assessment of a 118-unit apartment building from $6,502,000.00 to $5,571,500.00 based on the cost approach. At the Board hearing the assessor based his position on the income approach and reduced the assessment to $5,110,100.00. At the time of the assessment the building was in the final stages of completion.

HELD: The appeal is allowed and the market value for assessment purposes is $5,110,100.00. No costs awarded.

On an on-going basis, the income approach is the appropriate valuation method for large scale, multiple unit residential rental properties. An argument could be made to support a cost approach when the property is at the final stages of completion at assessment time.

The Board questions whether the application of a simple rate, developed by reference to sale of residential homes, achieves uniformity when applied to a large rental building.

The Board noted that Director did not use Section 84(1) after appeal was filed.

NSMB-6-89-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, c. 14 by **CAN-EURO INVESTMENTS LIMITED**, from a decision of the Nova Scotia Regional Assessment Appeal Court, City of Dartmouth, Assessment Region, dated May 2, 1989, which reduced the assessment on the subject property from $6,502,000.00 to $5,571,500.00.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: KATRINA VALENTINE, on behalf of the Appellant;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: October 31, 1989.

DECISION DATE: December 6, 1989.

DECISION: **Appeal allowed.**

D E C I S I O N

The property subject to this appeal is located at 7 Horizon Court in the City of Dartmouth which is on the east side of MicMac Boulevard just north of MicMac Mall. Construction of the fourteen storey, reinforced concrete, frame building was completed in early 1988. It contains 112 apartments plus 6 penthouses. The building is situated on a lot of land containing 140,000 square feet. The property also includes a

parking lot and three detached wood-frame buildings having 21 garage units.

The property was originally assessed in 1988 for $6,502,000.00. In a decision of May 2, 1989, the Regional Assessment Appeal Court, City of Dartmouth, reduced this value to $5,571,500.00. This value was arrived at by the use of the cost approach. The Regional Assessment Appeal Court in its decision noted that the income approach when applied to the property came up with somewhat lower figures. The Court was satisfied that the appropriate method of evaluation was the cost approach as argued by the assessor David MacDonald, representing the Director. At the Regional Assessment Appeal Court level Mr. MacDonald did agree that the original assessment was, in fact, too high.

In its Notice of Appeal, received by the Board on June 9, 1989, the Appellant appealed the decision of the Regional Assessment Appeal Court on the basis that it used the cost approach instead of using the income approach to valuation of the properties.

The only witness to appear before the Board for this hearing was the same David MacDonald who appeared before the Regional Assessment Appeal Court. Mr. MacDonald is a senior assessor for the Dartmouth Assessment Region. The Board accepted Mr. MacDonald as a witness qualified to give opinion evidence relating to assessment matters in the Dartmouth Assessment Region.

Mr. MacDonald prepared a valuation report for the subject property dated October 19, 1989. Mr. MacDonald reviewed the information included in his report noting that his final opinion on market value was based on the income approach to valuation. After applying a general level of assessment it was his opinion that the estimated value for the subject property was $5,110,100.00.

Ms. Valentine indicated that the Appellant was not necessarily in agreement with the specifics of the calculation carried out by Mr. MacDonald but was in agreement with the final result. She offered no contradictory evidence.

The Board notes with interest the change in the Director's opinion concerning the assessment on this property. The original assessment was for $6,502,000.00. This presumably, although it was not stated anywhere, was calculated on the cost approach. At the Regional Assessment Appeal Court, the Director reduced the original valuation to $5,571,500.00, again calculated on the cost approach.

It is also interesting to note that the Director did not make use of the provisions of Section 84(1), of the **Assessment Act**, which requires him to review and, if necessary, to alter an assessment after receiving a Notice of Appeal. This reduction was first suggested by his representative, the senior assessor, at the Regional Assessment Appeal Court.

The Board questioned Mr. MacDonald as to why he was now recommending the income approach for valuation after he had

argued, successfully, for the cost approach at the Regional Assessment Appeal Court. Mr. MacDonald replied that once the assessment was appealed to the Board "the matter was also reviewed by the appraisal unit of the Assessment Division. Based on consultation with them it appeared that the cost approach simply was not that valid an indicator of value...".

The Board notes the significant changes in the Director's opinion as it relates to the valuation of this property. The Board also notes that the Appellant in this case made full use of all the appeal processes available to achieve a final result it considered fairer and more equitable.

In this case, the Director's final position supports the Appellant's position. The Board wonders why it took two appeals to come to this agreement. The Board believes that such agreement could have been reached between the parties prior to any appeal taking place. In the final result, there is no disagreement between the position of the Appellant and the value set by the Director. Perhaps there should have been no disagreement from the very beginning. The Board does recognize that sometime the ramifications of an appeal bring about a convergence of views that might otherwise not occur.

As just noted, the parties in this case were in agreement that the income approach was the appropriate method for valuing the subject property. The Board agrees that, on an on-going basis, the income approach is the appropriate valuation method for large scale, multiple unit residential rental

properties.

The Board wonders, in this case, if an argument could not have been made to support a cost approach given that the subject property was at the final stages of completion at assessment time. This approach was not argued before the Board.

The Board notes that in arriving at his final opinion of value, Mr. MacDonald applied a general level of assessment. In his testimony, he indicated that this general level of assessment was calculated by reference to sales of residential properties in the City of Dartmouth. This calculation is made to ensure uniformity of assessed value as required by Section 38 of the **Assessment Act**.

This Section requires an assessor to ensure that taxation falls in a uniform manner on all residential property. The subject property is classified as residential. The Board wonders if the application of a simple rate, developed by reference to sale of residential homes, achieves this required uniformity when applied to a property of this magnitude. Could some other calculation achieve a more satisfactory result in regard to uniformity?

For the purposes of this hearing and in the absence of any evidence or argument to the contrary, the Board accepts the valuation as calculated by the Assessor in his report. For the 1988 assessment year the Board determines that the market value for assessment purposes for the subject property is $5,110,100.00.

Neither party requested costs from the Board. In light of the circumstances surrounding the issues involved in this case, and the fact that neither party was required to hire expert witnesses to appear before the Board, the Board determines that no costs will be awarded.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 6th day of December, A.D., 1989.

MICHAEL JOHNSON
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

DIRECTOR OF ASSESSMENT v. GORDON'S GREENHOUSES LTD.

ASSESSMENT - COSTS - ABANDONMENT OF APPEAL, MUNICIPAL BOARD ACT, S. 22.

This is an application by the Director for costs. G.G. Ltd. appealed its 1984 assessment to the Board and after various delays and two prehearing conferences, G.G. Ltd. abandoned its appeal 4 days before the start of the hearing. The Director sought to obtain an order of costs against G.G. Ltd. The Board held it had no jurisdiction once the appeal was abandoned. The Director obtained an Order of Mandamus instructing the Board to hold a hearing on the issue of costs.

HELD: No costs awarded.

Part of cost of setting up an assessment scheme is the cost of justifying the valuation placed on property. While the Board has awarded costs when the Director has succeeded at the hearing, it is not mandatory that it does.

As a basic principle the Board is not prepared to agree that the Director is entitled to his costs whenever an appeal is abandoned. There may be cases where it is appropriate.

The Appellant abandoned the appeal as a direct result of the Director advising he intended to seek a further increase. Given the size of the increase and the fact that the Director's position changed numerous times, special circumstances exist and the Board declines to award costs.

NSMB-135-86-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Application for costs pursuant to Section 22 of the Municipal Board Act by the **DIRECTOR OF ASSESSMENT** with respect to an appeal by **GORDON'S GREENHOUSES LTD.**

BEFORE: MICHAEL G. JOHNSON, Chairman
LINDA D. GARBER, Vice-Chairman
RICHARD L. WELDON, Member.

COUNSEL: JOHN ASHLEY, LL.B., for the Director of Assessment;

DOUGLAS CALDWELL, Q.C., for Gordon's Greenhouses Ltd.

HEARING DATE: October 24, 1989.

DECISION DATE: November 27, 1989.

DECISION: **No Costs Awarded.**

DECISION ON COSTS

On March 21, 1986, Gordon's Greenhouses Ltd. filed a Notice of Appeal from a decision of the Cumberland Regional Assessment Appeal Court. The decision dealt with the 1984 property tax assessment.

The Board scheduled and rescheduled the hearing of the appeal a number of times. Prehearing conferences were held on June 25, 1986 and January 29, 1987. The hearing was scheduled

to commence on September 14, 1987.

On September 10, 1987, the Board received a letter from Douglas Caldwell, Q.C., Solicitor for Gordon's Greenhouses, advising that the Appellant wished to abandon its appeal but wished to have the issue of costs addressed. This abandoment was unilateral.

By letter dated September 15, 1987, the then solicitor for the Director of Assessment, Douglas Keefe, advised the Board that the Director wished to be heard on the issue of costs.

On September 22, 1987, the Chairman of the Board wrote to Mr. Caldwell, copied to Mr. Keefe, which letter stated in part:

> "In referring to your letter and our Act I must admit to having some difficulty in determining the justification and jurisdiction for setting up a hearing before the Board as you requested".

The letter went on to request that the Board be provided with an outline of the arguments to justify why the Board should hold a hearing.

On September 15, 1988, a meeting was held at the Board's office to discuss this issue. In attendance were the Chairman of the Board, Michael Johnson, Douglas Caldwell, Douglas Keefe and John Ashley. At this meeting Mr. Caldwell stated that he had concluded that the Board did not have jurisdiction to hold a hearing and that it could not award costs at this stage. Mr. Keefe and Mr. Ashley stated, in their opinion, the Board could hold a hearing and determine the issue of costs.

On October 18, 1988, the Chairman of the Board wrote to the solicitors for both parties stating as follows:

> "Subsequent to our meeting of September 15, 1988, I have reviewed the matters related to costs as discussed at that time. I have reviewed various sections of the **Municipal Board Act** and the **Assessment Act.** The abandonment of this appeal means that there is no proceeding before the Board. Consequently, the Board will take no further action concerning the appeal and considers the file closed".

The Director of Assessment then made an application against the Board for an order in the nature of mandamus and an order in the nature of certiorari. Gordon's Greenhouses Ltd. did not attend the hearing of the application. Mr. Justice Davison allowed the application and ordered the Board to hear and determine the issue of costs.

In compliance with that Order the Board held a hearing on October 24, 1989. Both the Director of Assessment and Gordon's Greenhouses Ltd. were represented. Gordon's Greenhouses Ltd. is no longer seeking an Order of Costs from the Board. The Director maintains that he is a successful party and thereby entitled to his costs.

The **Assessment Act** which provides for an appeal to the Board does not deal with the issue of awarding costs at the Municipal Board level.

Section 22 of the **Municipal Board Act** provides as follows:

> "22(1) Except in respect of a proceeding pursuant to the Planning Act, the costs of and incidental to any proceeding before the Board shall be in the discretion of the board, and may be fixed at a sum certain, or may

be taxed.

(2) The Board may order by whom costs are to be taxed and may prescribe the scale under which costs are to be taxed."

Section 23 of the **Municipal Board Act** provides for the making of rules respecting practice and procedures before the Board. The Rules of Practice and Procedure Respecting Appeals under the Assessment Act were approved by O.I.C. 83 - 1369 on December 13, 1988. These Rules do not deal with costs.

Rule 40.03 of the **Nova Scotia Civil Procedure Rules** governs costs where a party discontinues a proceeding or withdraws a cause of action in the Supreme and County Courts. The **Civil Procedure Rules** have not been adopted by the Board and Rule 40.03 does not automatically apply to this case.

A brief review of the history of **English Supreme Court Rules** on which the **Nova Scotia Civil Procedure Rules** are based reveals that the right of a party to recover costs on the discontinuance of an action are founded on statutory grounds and do not appear to be based on common law.

Many assessment appeals to the Board are discontinued before the scheduled hearing. Prior to this case, the Board has not been asked to award costs to the Director when there has been an abandonment or a discontinuance of an appeal.

This case is exceptional because prior to the abandonment both parties had incurred considerable cost in preparing for the appeal in addition to costs already incurred for the proceeding before the Regional Assessment Appeal Court.

Outside experts had been hired. Between the time of the filing of the appeal and the abandonment there had been changes in the position of the parties as to the valuation of the property.

Mr. Caldwell accepts as a principle that the Crown should be treated the same as other litigants and be entitled to its costs except where special circumstances exist: Bent v. N.S. Farm Loan Board (1978), 30 N.S.R. (2d.) 552. He argues that there are special circumstances in this case which disentitle the Director to its costs.

Before dealing with the question of special circumstances, the Board wishes to examine the Director's position. The Board does not necessarily agree that in appeals to the Board under the **Assessment Act**, the Director of Assessment can always be treated the same as other litigants.

The **Assessment Act** gives the Director of Assessment the power to impose a value for taxation purposes on property. The Act provides a mechanism for the taxpayer to challenge that assessment through a series of appeals. The Director is required to respond to these appeals and, in fact, justify the assessment. The **Assessment Act** does not permit the recovery of costs at the Regional Assessment Appeal Court level.

Under the **Municipal Board Act** the Board is given the power to award costs at its discretion.

The Bent case and others which support the position that the Crown should be treated like an ordinary litigant were not cases under taxing statutes.

Part of the cost of setting up an assessment scheme is the cost of justifying the valuation placed on property. While the Board has exercised its discretion and on occasion awarded costs when the Director has succeeded at the hearing in justifying the assessment, it is not mandatory that it does award costs.

As a basic principle the Board is not prepared to agree that the Director of Assessment is entitled to his costs whenever an appeal is abandoned. There may well be cases, however, where it is appropriate that the Board award costs to the Director on an abandonment.

The Board need not decide the issue in this case. The Board can decide the issue of whether the Director is entitled to costs in this case by relying on the special circumstances set out by Mr. Caldwell.

The Appellant's argument against awarding costs in this case is the fluctuation in the Director's position of the assessed value of the property. In 1983 the property was assessed at $1.4 million (all figures are approximate). In 1984 it was reassessed at 1.9 million and the Appellant appealed this assessment. At the hearing by the Regional Assessment Appeal Court evidence was given that the assessed value should be 2.8 million. The hearing adjourned and eventually the assessment was set at $2,025,000.

After the present appeal was filed, the Director's position changed at least once again and it was alleged that the

assessed value was $3.5 million. Faced with the possibility of receiving a $3.5 million assessment, the Appellant chose to abandon the appeal.

The Director did not file a cross-appeal. The **Assessment Act** permits both the Regional Assessment Appeal Court and the Board to increase the amount of valuation of any property. This power to increase an assessment has been used as a basis for the Director to introduce new evidence before the Board to increase an assessment during an on-going appeal without the necessity of the Director filing a cross-appeal. This is an extraordinary procedure and one which has been the subject of comment in both this and other jurisdictions.

In Collins v. Director of Assessment, NSMB-10-88-A (unreported), the Board noted:

> "[page 35] This late application to increase the assessment...can in some circumstances smack of an attempt by the Director to intimidate the taxpayer initiating his appeal".

The Board questions whether the Director should be entitled to costs when as a result of the Director advising an Appellant that he intends to seek an increased assessment, an Appellant abandons the appeal. In this case the Appellant abandoned the appeal as a direct result of the Director advising that he intended to seek a further increased assessment. Given the size of the increase and the fact that the Director's position had changed numerous times, the Board is satisfied that special circumstances exist.

The Board exercises its discretion and declines to award costs to the Director.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of November, A.D., 1989.

MICHAEL G. JOHNSON,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.